

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 540.

JULIUS F. SMETANKA, AS COLLECTOR OF INTERNAL
REVENUE OF THE UNITED STATES FOR THE FIRST
DISTRICT OF ILLINOIS, PETITIONER,

vs.

FIRST TRUST & SAVINGS BANK, TRUSTEE UNDER
THE LAST WILL AND TESTAMENT OF OTTO YOUNG,
DECEASED.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States court room, in the city of Chicago, in said district and division, before the Honorable George T. Page, United States Circuit Judge for the Seventh Judicial Circuit holding United States District Court for the Northern District of Illinois, by assignment, on Wednesday, the eighth day of December, in the year of our Lord one thousand nine hundred and twenty, being one of the days of the regular November term of said court, begun Monday, the first day of November and of our independence the 145th year.

Present: Honorable George T. Page, circuit judge; John J. Bradley, U. S. marshal; John H. R. Jamar, clerk.

2 In the District Court of the United States, Northern District of Illinois, Eastern Division.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER THE LAST will and testament of Otto Young, deceased, plaintiff,

vs.

JULIUS F. SMJETANKA, AS COLLECTOR OF INTERNAL REVENUE of the United States of America, for the First District of Illinois, defendant.

No. 32992.

Be it remembered that on this day, to wit: The 21st day of January, 1919, came the plaintiff in said entitled suit, by its attorneys, and filed in the clerk's office of said court its praecipe praying for the issuance of a writ of summons against the defendant which said praecipe is in words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois, Eastern Division, ss.*

DISTRICT COURT MARCH TERM, A. D. 1919.

FIRST TRUST AND SAVINGS BANK, TRUSTEE under the last will and testament of Otto Young, deceased,

vs.

JULIUS F. SMJETANKA, AS COLLECTOR OF INTERNAL revenue of the United States of America, for the First District of Illinois.

In assumpsit, damages, \$50,000.00.

The clerk of said court will issue a summons in said cause to said defendants, in a plea of trespass on the case on promises to the damage of said plaintiff in the sum of fifty thousand dollars, direct the same to the United States marshal for said district to execute, and make it returnable to the March term of said court, 1919.

3

Dated this 21st day of January, A. D. 1919.

WILSON, MOORE & McILVAINE,
Plaintiff's Attorneys.

To T. C. MacMillan, Clerk.

(Endorsed) Filed Jan. 21, 1919, T. C. MacMillan, Clerk.

On the same day, to-wit: The 21st day of January, 1919, a writ of summons issued out of the clerk's office of said court against said defendant in said above entitled cause, as prayed for in said praecipe, which said writ with the return of the marshal thereon endorsed is in the words and figures following, to-wit:

District Court of the United States of America,
Northern District of Illinois, ss.

UNITED STATES OF AMERICA.

To the Marshal of the Northern District of Illinois, greeting:

We command you to summon Julius F. Smietanka, as collector of internal revenue of the United States of America, for the First District of Illinois, if found in your district, to be and appear before our judge of the District Court of the United States for the Northern District of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March, next, to answer unto First Trust and Saving Bank, trustee under the last will and testament of Otto Young, deceased, of a plea of trespass on the case upon promises, to its damages, as it alleges, of fifty thousand dollars (\$50,000.00) dollars, and have you then and there this writ.

Witness, The Hon. George A. Carpenter, judge of the District Court of the United States of America, at Chicago aforesaid, this 21st day of January, in the year of our Lord one thousand nine hundred and 19 and of our independence the 143rd year.

[SEAL.]

T. C. MacMILLAN,
Clerk.

MARSHAL'S RETURN.

I have served this writ within my district upon the within named Julius M. Smietanka, as collector of internal revenue of the United States of America for the First District of Illinois, by reading the same to and within his presence and hearing and at the same time delivering to him a true copy thereof, at Chicago, Illinois, this 22nd day of Jan. A. D. 1919.

JOHN J. BRADLEY,
U. S. Marshal,

By P. J. GALLIGAN,
Deputy.

Marshal fees: 1 service, \$2.00.

(Endorsed) Filed Jan. 22, 1919, T. C. MacMillan, Clerk.

And on to-wit: The 21st day of January, 1919, come the plaintiff herein by its attorneys and filed in the clerk's office of said court its certain declaration in words and figures following, to-wit:

In the District Court of the United States, for the Northern District of Illinois, Eastern Division.

March Term, A. D. 1919.

FIRST TRUST AND SAVINGS BANK, TRUSTEE under the last will and testament of Otto Young, deceased, plaintiff,

vs.

JULIUS F. SMIETANKA, AS COLLECTOR OF STATES OF AMERICA, for the First Internal Revenue of the United District of Illinois, defendant.

32992.

First Trust and Saving Bank, trustee under the last will and testament of Otto Young, deceased, plaintiff in this suit, by
5 Wilson, Moore & McIlvaine, its attorneys, complains of Julius F. Smietanka, as collector of internal revenue of the United States of America, for the first district of Illinois, defendant in this suit, summoned, etc, of a plea of trespass on the case on promises; and says that the plaintiff is, and was during all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; and is, and was during all the times hereinafter mentioned, a resident and citizen of the State of Illinois, having its principal place of business in said first district of Illinois; and is, and was during all the times hereinafter mentioned, trustee under the last will and testament of Otto Young, deceased, and that the defendant is now, and was during all the times hereinafter mentioned, the collector of internal revenue of the United States of America for the first district of Illinois, duly qualified and acting as such, and an inhabitant of the Eastern Division of the Northern District of the State of Illinois; and the plaintiff avers that the amount involved in this controversy exceeds, exclusive of interests and costs, the sum or value of fuor thousand dollars (\$4,000.00); that said controversy arose under and by virtue of the Constitution and laws of the United States of America.

For that whereas said Otto Young died on the 30th day of November, 1906, a resident of the city of Chicago, leaving a last will and testament, and codicil thereto, bearing date respectively December 5th, 1905, and November 17th, 1906, which said last will and testament and codicil thereto were duly admitted to probate by the Probate Court of Cook County, Illinois, on February 19th, 1907, and May 8th, 1907, respectively. That complainant herein was by said last will and testament nominated and appointed trustee of

the estate of said Otto Young, deceased; that it duly qualified as such trustee and has been ever since the death of said Otto Young, and now is, acting as such trustee; that said last will and testament of said Otto Young, after giving certain annuities and providing for the disposition of certain portions of the income from his estate during the lives of his widow and four daughters, and until his youngest surviving grandchild attained the age of twenty-one (21) years, contained the following provision:

"Sixth.—When the last survivor of my daughters shall have deceased and the youngest surviving child of my daughters shall have attained the age of twenty-one (21) years all of said trust estate then remaining in the hands of said trustee shall be divided in equal shares between my grandchildren, the surviving issue of any deceased grandchild to stand in the place of and receive the share which such deceased grandchild would have been entitled to receive if then living * * * The excess, if any, of the income of said trust estate, over and above the payments hereinbefore provided to be made therefrom, shall be accumulated in the hands of said trustee and form a part of the said trust estate, subject to the like control and power of the disposition on the part of said trustee, as the principal of said trust estate."

Plaintiff alleges that said widow and four daughters survived said Otto Young, and continued to survive during all the times hereinafter mentioned. That plaintiff has at all times paid the widow and four daughters of Otto Young, and all other beneficiaries under his will, the full share of income to which they were severally entitled under the last will and testament of said Otto Young, deceased.

That plaintiff as trustee as aforesaid was required to and did file in the office of the collector of internal revenue of the United States for the first district of Illinois return of income received or accrued during the year ending December 31st, 1913, in the form prescribed for return of annual income by fiduciaries, all as provided by the act of Congress approved October 3rd, 1913, and that said return was filed by plaintiff within the time prescribed by said act of Congress, and disclosed the several amounts of income paid or accrued to each beneficiary, and the amount of income retained and accumulated under the terms of the last will and testament of said Otto Young, deceased. That upon said return so made the Commissioner of Internal Revenue determined that there was accumulated in the hands of plaintiff, as trustee as aforesaid under said sixth article of said will of Otto Young, deceased, the sum of two hundred twenty one thousand six hundred eleven dollars and five cents (\$221,611.05), which had been received or accrued during the year ending December 31st, 1913, subsequent to March first of said year, and upon said sum so in the hands of plaintiff said Commissioner of Internal Revenue assessed an income tax for the year ending December 31st, 1913, of ten thousand nine hundred fifteen dollars and twenty four cents (\$10,915.24).

That the said defendant, being Collector of Internal Revenue as aforesaid, did on, to wit, the 8th day of September, 1916, demand of the plaintiff that it should on or before the 18th day of September, 1916, pay the sum of ten thousand nine hundred fifteen dollars and twenty four cents (\$10,915.24) as an income tax alleged to be due under and by virtue of the provisions of the act of Congress approved October 3rd, 1913, entitled "An act to reduce tariff duties and to provide revenue for the Government, and for other purposes," on the said income in the sum of two hundred twenty one thousand six hundred eleven dollars and five cents (\$221,611.05), which was retained and held in the possession of plaintiff as trustee as aforesaid as accumulations under the will of said Otto Young, deceased, for the benefit of unascertained persons, and said defendant did then and there threaten the plaintiff, in the event of non payment, with certain penalties provided by the statute of the United States for the punishment of delinquent taxpayers.

That in order to save itself from having its property seized and levied on under distraint, the said plaintiff did on, to wit, the 18th day of September, 1916, in the district aforesaid, pay to the said defendant as collector as aforesaid, the said sum of ten thousand nine hundred fifteen dollars and twenty-four cents (\$10,915.24), covering said income tax so demanded by the defendant under protest; and at the time of making said payment it then and there served formal notice of its protest upon said defendant, which said protest was and is in words and figures as follows, to wit:

"First Trust and Savings Bank
First National Bank Building,
Chicago.

September 18, 1916.

Hon. Julius F. Smietanka,
Collector of Internal Revenue,
426 Federal Building,
Chicago, Ill.

Dear Sir:

Pursuant to the notice and demand received from you, dated September 8, 1916, addressed to Estate of Otto Young, care First Trust and Savings Bank, Trustee, based upon the alleged assessment of tax upon the income of the undersigned First Trust and Savings Bank as Trustee under the will of Otto Young, deceased, for the period ending December 31, 1913, by the Commissioner of Internal Revenue, under the pretended authority of Section 11 of the Act of Congress approved October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes', payment is herewith made to you in the amount of \$10,915.24, the amount of the tax stated in said notice to be so assessed and which said demand states to be due and payable on or before September 18, 1916. Protest is hereby made against

the said assessment and against the exaction of said tax and each and every part thereof, upon the ground that the same is invalid, wrongful, excessive, and wholly unauthorized by law, and contrary to the rights of the undersigned bank, as Trustee as aforesaid, and of the beneficiaries of said estate or trust under the constitution and laws of the United States. Said payment is made solely under compulsion of said notice and demand, to avoid the seizure of the property of the undersigned Trustee and the other pains and penalties thereby threatened.

FIRST TRUST AND SAVINGS BANK,
Trustee, under the will of Otto Young, deceased.
By LOUIS BOISOT,
Vice President.

Receipt is hereby acknowledged September 18, 1916, of the letter of which the above is a copy.

Collector Int. Rev.
Sep. 18 1916
1st Dist. of Ill.
C. W. A.

Plaintiff further avers that thereafter, to wit, on or about the 13th day of March, 1918, the plaintiff filed with the defendant, as collector as aforesaid, and thereafter, to wit, on the 14th day of March, 1918, the defendant transmitted to the Commissioner of Internal Revenue an appeal in the form of a claim for refund of said tax erroneously and illegally collected. Said appeal to the Commissioner of Internal Revenue was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and was in the words and figures following, to wit:

"TREASURY DEPARTMENT
U. S. Internal Revenue,
Form 46—Revised May, 1917,
Ed. 60,000—F. C., May 14-17.

1st Illinois
Mar. 13, 1918
Collr. Int. Rev.

9

CLAIM FOR REFUND.

Taxes Erroneously or Illegally Collected.

Also Amounts Paid for Stamps used in Error or Excess.
Important.

This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor.

State of Illinois }
County of Cook } ss

To be stamped by
Collector showing district
and date received.

Louis Boisot, Vice President of
First Trust and Savings Bank,
Trustee of the Estate of Otto Young, deceased,
(Name of Claimant)
First National Bank Building, Chicago,
(Address of Claimant)

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by Trustee of the Estate of Otto
claimant Houg, deceased.
tax Income Tax
2. Character of assessment or (State for or upon what the
tax was assessed or the stamps
affixed.)
3. Amount of assessment. ten thousand nine hundred
fifteen & 24/100
dollars \$10,915.24
4. Amount now asked to be ten thousand nine hundred
refunded fifteen & 24/100
dollars \$10,915.24
5. Date of payments of as- 18th day of September, A. D.
essment 1916.

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons

That said tax was levied and assessed against undistributed income received by said Bank, as said Trustee, during the year 1913, which income, under the terms and provisions of the will of said Otto Young, deceased, was directed to be, and was in fact, accumulated in trust by said Trustee for the benefit of unborn or unascertained persons. No part of said income has been distributed to any beneficiary; that the law then in force did not authorize the assessment or collection of said tax, and that said tax was paid under written protest.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for

the refunding of the whole or any part of the amount stated in Item 3.

Signed: LOUIS BOISOT.

Sworn to and subscribed before me this 13th day of March, 1918.
(Notarial seal) JOSEPH R. JULIN.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)"

Said claim for refund having attached thereto the original demand and receipt for said tax, which was in words and figures as follows:
"No. D 22426

UNITED STATES INTERNAL REVENUE
Office of Collector
First District of Illinois.

Form No. 1.

(Revised May 5, 1913)

Chicago, Sep 18 1916

Received of Estate of Otto Young Ten thousand nine hundred fifteen and 24/100 Dollars, on account of Individual Income

\$10915.24

(Enter here on what account paid and period of liability,
e. g.,

----- \$-----
'Special excise tax 1913,' '50 per cent penalty, R. L. D.,
6 months June 30' 1913,' 'Offer in compromise,' etc.)

Five per cent penalty----- \$-----

Interest at 1 per cent per month for

-----months----- \$-----

Total amount paid-----

\$10915 24

\$10,915.24

JULIUS F. SMETANKA, *Collector.*"

11 and said appeal and claim was considered by the Commissioner of Internal Revenue, and was by him rejected and disallowed on or about the 14th day of June, 1918.

Plaintiff alleges that said entire sum of two hundred twenty-one thousand six hundred eleven dollars and five cents (\$221,611.05) was accumulations of income received or accrued during the year ending December 31st, 1913, and remaining in the possession of this complainant, as trustee as aforesaid; that all of said income on which said entire tax of ten thousand nine hundred fifteen dollars and twenty-four cents (\$10,915.24) was so assessed and collected was in fact accumulated in trust by the complainant as trustee as aforesaid under the sixth article of the last will and testament of Otto Young, deceased, for the benefit of unascertained persons, and that no part of said income on which said income tax of ten thousand nine hundred fifteen dollars and twenty four cents (\$10,915.24) was assessed was or has been at any time distributed to any beneficiary.

Plaintiff further alleges that said accumulations in the sum of two hundred twenty one thousand six hundred eleven dollars and five cents (\$221,611.05), remaining in its possession as aforesaid, was not subject to tax under the act of Congress approved October 3rd, 1913, or any other act, law, or statute of the United States; that the assessment, demand, and collection of said sum of ten thousand nine hundred fifteen dollars and twenty four cents (\$10,915.24) by defendant was unauthorized and illegal, and that the demand and collection of said tax was unauthorized and illegal for each of the reasons mentioned and set forth in said claim for refund and repayment, and for the reasons above herein set forth.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid, with lawful interest thereon; and being so liable the said defendant in consideration thereof, afterwards, to wit, on the 18th day of September, 1916, and at said county of Cook, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money, with interest thereon, when the said defendant should be thereunto afterwards requested.

And whereas, also said Otto Young died on November 30th, 1906, a resident of said city of Chicago, leaving a last will and testament and codicile thereto, which were duly admitted to probate, and which appointed plaintiff trustee thereunder, and contained the provisions hereinabove quoted, all as is more particularly set forth in the first count hereof; and whereas said Otto Young left him surviving his widow and four daughters, all as is more particularly set forth in the first count of this declaration, reference being made to said first count for the full particulars of all of said matters.

That plaintiff, as trustee as aforesaid, was required to and did file in the office of the collector of internal revenue of the United States for the first district of Illinois returns of income received or accrued during the year ending December 31st, 1914, in the form prescribed for return of annual net income by fiduciaries, all as provided by the act of Congress approved October 3rd, 1913, and that said returns were filed by plaintiff within the time prescribed by said act of Congress and disclosed the several amounts of income paid or accrued to each beneficiary, whether distributed or not, and the amount of income retained and accumulated under the terms of the last will and testament of Otto Young, deceased. That upon said returns so made the Commissioner of Internal Revenue determined that there was accumulated in the hands of plaintiff, as trustee as aforesaid under said sixth article of said will of Otto Young, deceased, the sum of two hundred eighty one thousand nine hundred forty dollars and forty-five cents (\$281,940.45), which had been received or accrued during the year ending December 31st, 1914, and upon said sum so in the hands of plaintiff said Commissioner of Internal Revenue assessed an income tax for the year ending Decem-

ber 31st, 1914, of fourteen thousand one hundred forty two dollars and eighty four cents (\$14,142.84).

That the said defendant, being collector of internal revenue as aforesaid, after allowing plaintiff a net credit of fifteen dollars and ninety six cents (\$15.96), to which plaintiff was entitled in connection with the payment of other income taxes, did on, to wit, the 31st day of August, 1917, demand of the plaintiff that it should, on or before the 10th day of September, 1917, pay the sum of fourteen thousand one hundred twenty six dollars and eighty eight cents (\$14,126.88) as an income tax alleged to be due under and by virtue of the provisions of the act of Congress approved October 3rd, 1913, entitled "An act to reduce tariff duties and to provide revenue for the Government, and for other purposes," on the said income

13 in the sum of two hundred eighty one thousand nine hundred forty dollars and forty five cents (\$281,940.45), which was retained and held in the possession of plaintiff as trustee as aforesaid as accumulations under the will of said Otto Young, deceased, for the benefit of unascertained persons; and said defendant did then and there threaten plaintiff, in the event of non payment, with certain penalties provided by the statutes of the United States for the punishment of delinquent taxpayers.

That in order to save itself from having its property seized and levied on under distraint, the said plaintiff did on, to wit, the 11th day of September, 1917, in the district aforesaid, pay to the said defendant as collector as aforesaid, the said sum of fourteen thousand one hundred twenty six dollars and eighty eight cents (\$14,126.88), covering said income tax so demanded by the defendant, under protest; and at the time of making said payment it then and there served formal notice of its protest upon said defendant, which said protest was in words and figures as follows, to wit:

" FIRST TRUST AND SAVINGS BANK
First National Bank Building
Chicago.

Coll. of Int. Rev.
Sep 11 1917
For First Dist
of Ill

September 10, 1917.

Hon. Julius F. Smetanka,
Collector of Internal Revenue,
426 Federal Building,
Chicago, Ill.

Dear Sir:—

Pursuant to notices and demands received from you dated August 31, 1917, addressed to the Estate of Otto Young, care of First Trust and Savings Bank, Trustee, based upon the alleged

assessment of taxes upon the income of the undersigned, First Trust and Savings Bank as Trustee under the will of Otto Young, deceased, for the periods hereinafter described, by the Commissioner of Internal Revenue, under the pretent authority of an Act of Congress approved October 3, 1913, and an Act of Congress approved September 8, 1916, payment is herewith made to you for the following amounts, the amounts of the taxes stated in said notices to be so assessed and which said demands state to be due and payable on or before September 10, 1917.

On account of Form 1041 for the period ending 1914,	\$2,803.44
On account of Form 1040 for the Period ending 1914,	11,323.44
On account of Form 1041 for the period ending 1915,	3,352.88
On account of Form 1040 for the period ending 1915	8,243.69
Total -----	\$25,723.45

Protest is hereby made against the said assessment and against the exaction of said taxes and each and every part thereof upon the ground that same is invalid, wrongful, excessive, wholly unauthorized by law and contrary to the rights of the undersigned bank, as Trustee as aforesaid, and of the beneficiaries of said estate or trust, under the Constitution and laws of the United States. Said payment is made solely under compulsion of said notices and demands to avoid the seizure of the property of the undersigned as Trustee and the other pains and penalties thereby threatened.

FIRST TRUST AND SAVINGS BANK,
As trustee under the Will
of Otto Young, deceased,
By Louis Boisot Vice President Trust Officer

Chicago, Sept. 10, 1917.

Receipt is hereby acknowledged September 10, 1917, of the letter of which the above is a copy.

Coll. of Int. Rev. }
Sep. 11 1917 }
For First Dist of Ill }

Plaintiff further avers that thereafter, to wit, on or about the 13th day of March, 1918, the plaintiff filed with the defendant, as collector as aforesaid, and thereafter, to wit, on the 14th day of March, 1918, the defendant transmitted to the Commissioner of Internal Revenue an appeal in the form of a claim for refund of said tax erroneously and illegally collected. Said appeal to the Commissioner of Internal Revenue was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury

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established in pursuance thereof, and was in the words and figures following, to wit:

15 "TREASURY DEPARTMENT, 1st Illinois
U. S. Internal Revenue, Mar 13 1918
Form 46—Revised May, 1917, Collr. Int. Rev.
Ed. 60,000 F. C., May 14, 1917,

Claim For Refund.

Taxes erroneously or Illegally Collected.

Also Amounts Paid for Stamps used in Error or Excess.

Important.

This claim should be forwarded to the Collector of Internal Revenue to whom the tax was paid and must be accompanied by Collector's Receipt therefor.

State of Illinois }
County of Cook, } ss

To be stamped by
Collector showing District
and date received.

Louis Boisot, Vice President of
First Trust and Savings Bank,
Trustee of the Estate of Otto Young, deceased.

(Name of Claimant)

First National Bank Building, Chicago.

(Address of Claimant.)

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above and that the facts stated below with reference to the claim are true and complete:

- | | |
|------------------------------------|---|
| 1 Business engaged in by claimant | Trustee of the Estate of Otto Young, deceased. |
| 2. Character of assessment or tax | Income Tax
(State for or upon what the tax was assessed or the stamps affixed) |
| 3. Amount of assessment | fourteen thousand
one hundred
twenty six &
88/100 dollars \$14,126.88 |
| 4. Amount now asked to be refunded | fourteen thousand
one hundred
twenty six &
88/100 dollars \$14,126.88 |
| 5. Date of payment of assessment. | the 11th day of September, A. D. 1917. |

16 Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons:

That said tax was levied and assessed against undistributed income received by said Bank, as said Trustee, during the year, 1914, which income, under the terms and provisions of the will of said Otto Young, deceased, was directed to be, and was in fact, accumulated in trust by said Trustee for the benefit of unborn or unascertained persons. No part of said income has been distributed to any beneficiary; that the law then in force did not authorize the assessment or collection of said tax, and that said tax was paid under written protest.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in Item 3.

Signed: LOUIS BOISOT.

Sworn to and subscribed before me this 13th day of March, 1918.
(Notarial seal)

JOSEPH R. JUPLIN,

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)"

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Said claim for refund having attached thereto the original demand and receipt for said tax, which was in words and figures as follows:

17 "Form 1-17B

NOTICE AND DEMAND FOR TAX AND RECEIPT—IN-
DIVIDUAL INCOME TAX

UNITED STATES INTERNAL REVENUE.

Form 23 B 1917 Jul; 11 14

Collector's Office First District
of Illinois.

(Year) (Month) (Folio) (Line)
com Lt 7/25 1041

(Individual, withholding agent
or fiduciary.)

24

At Chicago Date Aug 31 1917
Notice is hereby given that an
assessment has been made against
you in the amount set opposite
as tax on income as shown on
your return. Demand is here
made for the payment of said tax
on or before the due date given
below. Failure to do so will
cause a 5 per cent penalty to
accrue with interest at 1 per
cent per month from due until
paid.

For period ended 1914

Taxes, Penalties, etc.

Normal tax ----- \$2803. 44

Additional tax -----

50 per cent penalty -----

100 per cent penalty -----

5 per cent penalty -----

Total 2803. 44

Due Date Sep 10 1917

JULIUS F. SMETANKA
Collector of Internal
Revenue

Received payment

Est of Otto Young
1st Trust & Savings Bk.
Trustee
38 So. Dearborn St.
Chicago Ill

Sep. 11 1917
JULIUS F. SMETANKA
Collector of Internal
Revenue

18 This notice with attached copies must be presented at the
time payment is tendered, as when properly stamped 'paid'
by the collector it becomes a receipt for taxes. Disregard all
previous notices."

25 "Form 1-17B

NOTICE AND DEMAND FOR TAX AND RECEIPT—INDIVIDUAL INCOME TAX

UNITED STATES INTERNAL REVENUE

Collector's Office First District
of IllinoisForm 23B 1917 July; 10 26
(year) (Month) (Folio) (Line)
1040

At Chicago Date Aug 31 1917
Notice is hereby given that an
assessment has been made against
you in the amount set opposite
as tax on income as shown on
your return. Demand is here
made for the payment of said tax
on or before the due date given
below. Failure to do so will
cause a 5 per cent penalty to
accrue with interest at 1 per
cent per month from due date
until paid.

(Individual, withholding
agent, or fiduciary)
For period ended 1914
Taxes, Penalties, etc.
Normal tax-----\$11,323.44
Additional tax -----
50 per cent penalty-----
100 per cent penalty-----
5 per cent penalty-----
Total----- 11,323.44

Due Date Sep 10 1917

JULIUS F. SMETANKA
Collector of Internal
Revenue

Est of Otto Young
1st Trust & Savings Bk.
Trustee
38 So. Dearborn St.
Chicago, Ill.

Received payment,
Sep 11 1917
JULIUS F. SMETANKA
Collector of Internal
Revenue

19 This notice with attached copies must be presented at the
time payment is tendered, as when properly stamped 'paid'
by the collector it becomes a receipt for taxes. Disregard all
previous notices."

and said appeal and claim was considered by the Commissioner of
Internal Revenue, and was by him rejected and disallowed on or
about the 14th day of June, 1918.

Plaintiff alleges that said entire sum of two hundred eight one thousand nine hundred forty dollars and forty five cents (\$281,940.45) was accumulations of income received or accrued during the year ending December 31st, 1914, and remaining in the possession of this complainant, as trustee as aforesaid; that all of said income on which said entire tax of fourteen thousand one hundred twenty six dollars and eighty eight cents (\$14,126.88) was so assessed and collected was in fact accumulated in trust by the complainant as trustee as aforesaid under the sixth article of the last will and testament of Otto Young, deceased, for the benefit of unascertained persons, and that no part of said income on which said income tax of fourteen thousand one hundred twenty six dollars and eighty eight cents (\$14,126.88) was assessed was or has been at any time distributed to any beneficiary.

Plaintiff further alleges that said accumulations in the sum of two hundred eighty one thousand nine hundred forty dollars and forty-five cents (\$281,940.45), remaining in its possession as aforesaid, was not subject to tax under the act of Congress approved October 3rd, 1913, or any other act, law, or statute of the United States; that the assessment, demand, and collection of said sum of fourteen thousand one hundred twenty six dollars and eighty eight cents (\$14,126.88) by defendant was unauthorized and illegal, and that the demand and collection of said tax was unauthorized and illegal for each of the reasons mentioned and set forth in said claim for refund and repayment, and for the reasons above herein set forth.

By reason whereof the said defendant became liable and is bound by law to refund and pay to the plaintiff the amount so paid, with lawful interest thereon; and being so liable the said defendant, in consideration thereof, afterwards, to wit, on the 11th day of September, 1917, and at the said county of Cook, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money, with interest thereon, when the said defendant should be thereunto afterwards requested.

And whereas also said Otto Young died on November 30th, 1906, a resident of said city of Chicago, leaving a last will and testament and codicil thereto, which were duly admitted to probate, and which appointed plaintiff trustee thereunder, and contained the provisions hereinabove quoted, all as is more particularly set forth in the first count hereof; and whereas said Otto Young left him surviving his widow and four daughters, all as is more particularly set forth in the first count of this declaration, reference being made to said first count for the full particulars of all of said matters.

That plaintiff, as trustee as aforesaid, was required to and did file in the office of the collector of internal revenue of the United States for the first district of Illinois returns of income received or accrued during the year ending December 31st, 1915, in the form pre-

scribed for return of annual net income by fiduciaries, all as provided by the act of Congress approved October 3rd, 1913, and that said returns were filed by plaintiff within the time prescribed by said act of Congress and disclosed the several amounts of income paid or accrued to each beneficiary, whether distributed or not, and the amount of income retained and accumulated under the terms of the last will and testament of said Otto Young, deceased. That upon said returns so made the Commissioner of Internal Revenue determined that there was accumulated in the hands of plaintiff, as trustee as aforesaid under said sixth article of said will of Otto Young, deceased, the sum of two hundred eighty six thousand three hundred fifty four dollars and fifteen cents (\$286,354.15), which had been received or accrued during the year ending December 31st, 1915, and upon said sum so in the hands of plaintiff said Commissioner of Internal Revenue assessed an income tax for the year ending December 31st, 1915, of fourteen thousand five hundred eighty two dollars and eighteen cents (\$14,582.18).

That the said defendant, being collector of internal revenue, as aforesaid, after allowing plaintiff a net credit of two thousand nine hundred eighty five dollars and sixty one cents (\$2,985.61), to which plaintiff was entitled in connection with the payment of other income taxes, did on, to wit, the 31st day of August, 1917, demand of the plaintiff that it should, on or before the 10th day of September, 1917, pay the sum of eleven thousand five hundred ninety six dollars and fifty seven cents (\$11,596.57) as an income tax alleged to be due under and by virtue of the provisions of the act of Congress approved

October 3rd, 1913, entitled "An act to reduce tariff duties and to provide revenue for the Government, and for other purposes."

on the said income in the sum of two hundred eighty six thousand three hundred fifty four dollars and fifteen cents (\$286,354.15), which was retained and held in the possession of plaintiff as trustee as aforesaid as accumulations under the will of said Otto Young, deceased, for the benefit of unascertained persons; and said defendant did then and there threaten plaintiff, in the event of non payment, with certain penalties provided by the statutes of the United States for the punishment of delinquent taxpayers.

That in order to save itself from having its property seized and levied on under distraint, the said plaintiff did on, to wit, the 11th day of September, 1917, in the district aforesaid, pay to the said defendant as collector as aforesaid, the said sum of eleven thousand five hundred ninety-six dollars and fifty-seven cents (\$11,596.57), covering said income tax so demanded by the defendant, under protest; and at the time of making said payment it then and there served formal notice of its protest upon said defendant, which said protest was in words and figures as follows, to-wit:

"First Trust and Savings Bank
First National Bank Building,
Chicago.

{ Coll. of Int. Rev.
Sep. 11 1917.
For First Dist
of Ill }

September 10, 1917.

Hon. Julius F. Smietanka,
Collector of Internal Revenue,
426 Federal Building,
Chicago, Ill.

Dear Sir:

Pursuant to notices and demands received from you dated August 31, 1917, addressed to the Estate of Otto Young, care of First Trust and Savings Bank, Trustee, based upon the alleged assessment of taxes upon the income of the undersigned, First Trust and Savings Bank as Trustee under the will of Otto Young, deceased, for the periods hereinafter described, by the Commissioner of Internal Revenue, under the pretent authority of an Act of Congress, approved October 3, 1913, and an Act of Congress approved September 8, 1916, payment is herewith made to you for the following amounts, the amounts of the taxes stated in said notices to be so assessed and which said demands state to be due and payable on or before September 10, 1917.

On account of Form 1041 for the period ending 1914	\$2,803.44
On account of Form 1040 for the period ending 1914	11,323.44
On account of Form 1041 for the period ending 1915	3,352.88
On account of Form 1040 for the period ending 1915	8,243.69
Total -----	\$25,723.45

Protest is hereby made against the said assessment and against the exaction of said taxes and each and every part thereof upon the ground that same is invalid, wrongful, excessive, wholly unauthorized by law and contrary to the rights of the undersigned bank, as Trustee as aforesaid, and of the beneficiaries of said estate or trust, under the Constitution and laws of the United States. Said payment is made solely under compulsion of said notices and demands to avoid

the seizure of the property of the undersigned as Trustee and the other pains and penalties thereby threatened.

FIRST TRUST AND SAVINGS BANK,
As Trustee under the will of Otto Young, deceased.

By LOUIS BOISOT,
Vice President, Trust Officer.

Chicago, Sept. 10, 1917.

Receipt is hereby acknowledged September 10, 1917, of the letter of which the above is a copy.

{ Coll of Int. Rev. }
{ Sep 11 1917 }
{ For First Dist of Ill } "

Plaintiff further avers that thereafter, to wit, on or about the 13th day of March, 1918, the plaintiff filed with the defendant, as collector as aforesaid, and thereafter, to wit, on the 14th day of March, 1918, the defendant transmitted to the Commissioner of Internal Revenue an appeal in the form of a claim for refund of said tax erroneously and illegally collected. Said appeal to the Commissioner of Internal Revenue was made according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and was in the words and figures following, to wit:

23 "Treasury Department, 1st Illinois
U. S. Internal Revenue, Mar 13 1918
Form 46—Revised May, 1917, Collr. Int. Rev.
Ed. 60,000 F. C., May 14, 1917,

Claim for Refund.

Taxes erroneously or Illegally Collected.

Also Amounts Paid for Stamps used in Error or Excess.

Important.

This claim should be forwarded to the Collector of Internal Revenue to whom the tax was paid and must be accompanied by Collector's Receipt therefor.

State of Illinois }⁸⁸
County of Cook, }

To be stamped by
Collector showing District
and date received.

Louis Boisot, Vice President of
First Trust and Savings Bank,
Trustee of the Estate of Otto Young, deceased.
(Name of Claimant)
First National Bank Building, Chicago.
(Address of Claimant.)

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant Trustee of the Estate of Otto Young, deceased.
2. Character of assessment of tax Income Tax
(State for or upon what the tax was assessed or the stamps affixed)
3. Amount of assessment. eleven thousand five hundred ninety six & 57/100 dollars \$11,596.57
4. Amount now asked to be refunded eleven thousand five hundred ninety six & 57/100 dollars \$11,596.57
5. Date of payment of assessment. the 11th day of September AD. 1917.

- 24 Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons:

That said tax was levied and assessed against undistributed income received by said Bank, as said Trustee, during the year, 1915, which income, under the terms and provisions of the will of said Otto Young, deceased, was directed to be, and was in fact, accumulated in trust by said Trustee for the benefit of unborn or unascertained persons. No part of said income has been distributed to any beneficiary; that the law then in force did not authorize the assessment or collection of said tax, and that said tax was paid under written protest.

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in Item 3.

Signed: LOUIS BOISOT.

Sworn to and subscribed before me this 13th day of March, 1918.
(Notarial seal) JOSEPH R. JULIN.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)"

Said claim for refund having attached thereto the original demand and receipt for said tax, which was in words and figures as follows:

NOTICE AND DEMAND FOR TAX AND RECEIPT—INDIVIDUAL INCOME TAX

UNITED STATES INTERNAL REVENUE.

Collector's Office First District (Year) (Month) (Folio) (Line)
of Illinois
at Chicago Date Aug 31 1917 1041

25 Notice is hereby given that an assessment has been made against you in the amount set opposite as tax on income as shown on your return. Demand is here made for the payment of said tax on or before the due date given below. Failure to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

Individual, withholding agent, or
fiduciary.)

For period ended 1915

Taxes, Penalties, etc.,

Normal tax-----\$3352.88

Additional tax-----

50 per cent penalty-----

100 per cent penalty-----

5 per cent penalty-----

Total 3352.88

Due date Sep 10 1917

JULIUS F. SMETANKA
Collector of Internal
Revenue

Received payment,
Sep 11 1917

JULIUS F. SMETANKA
Collector of Internal
Revenue.

Est of Otto Young
1st Trust & Savings Bk
Trustee
38 So Dearborn St.
Chicago, Ill.

This notice with attached copies must be presented at the time payment is tendered, as when properly stamped 'paid' by the collector it becomes a receipt for taxes. Disregard all previous notices."

22 JULIUS F. SMETANKA VS. FIRST TRUST & SAVINGS BANK.

26 "Form 1-17B

NOTICE AND DEMAND FOR TAX AND RECEIPT—
INDIVIDUAL INCOME TAX

UNITED STATES INTERNAL REVENUE

Collector's Office First District
of Illinois

Form 23B 1917 Jul 10 27
(Year) (Month) (Folio) (Line)
1040

At Chicago Date Aug 31 1917

(Individual, withholding
agent, or fiduciary.)

Notice is hereby given that an assessment has been made against you in the amount set opposite as tax on income as shown on your return. Demand is here made for the payment of said tax on or before the due date given below. Failure to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

For period ended 1915

Taxes, Penalties, etc.

Normal tax-----\$8243. 69

Additional tax-----

50 per cent penalty-----

100 per cent penalty-----

5 per cent penalty-----

Total 8243. 69

Due date Sep 10 1917.
JULIUS F. SMETANKA
Collector of Internal
Revenue.

Received payment
Sep 11 1917

Est of Otto Young,
1st Trust & Savings Bk
Trustee
38 So. Dearborn St.
Chicago, Ill

JULIUS F. SMETANKA
Collector of Internal
Revenue.

This notice with attached copies must be presented at the time payment is tendered, as when properly stamped 'paid' by the collector it becomes a receipt for taxes. Disregard all previous notices."

27 and said appeal and claim was considered by the Commissioner of Internal Revenue, and was by him rejected, and disallowed on or about the 14th day of June, 1918.

Plaintiff alleges that said entire sum of two hundred eighty six thousand three hundred fifty four dollars and fifteen cents (\$286,354.15) was accumulations of income received or accrued during the year ending December 31st, 1915, and remaining in the possession of this complainant, as trustee as aforesaid; that all of said income on which said entire tax of eleven thousand five hundred ninety six dollars and fifty seven cents (\$11,596.57) was so assessed and collected was in fact accumulated in trust by the complainant as trustee as aforesaid under the sixth article of the last will and testament of Otto Young, deceased, for the benefit of unascertained persons, and that no part of said income on which said income tax of eleven thousand five hundred ninety six dollars and fifty seven cents (\$11,596.57) was assessed was or has been at any time distributed to any beneficiary.

Plaintiff further alleges that said accumulations in the sum of two hundred eighty six thousand three hundred fifty four dollars and fifteen cents (\$286,354.15), remaining in its possession as aforesaid, was not subject to tax under the act of Congress approved October 3rd, 1913, or any other act, law, or statute of the United States; that the assessment, demand, and collection of said sum of eleven thousand five hundred ninety six dollars and fifty seven cents (\$11,596.57) by defendant was unauthorized and illegal, and that the demand and collection of said tax was unauthorized and illegal for each of the reasons mentioned and set forth in said claim for refund and repayment, and for the reasons above herein set forth.

By reason whereof the said defendant became liable, and is bound by law, to refund and pay to the plaintiff the amount so paid, with lawful interest thereon; and being so liable to the said defendant, in consideration thereof, afterwards, to wit, on the 11th day of September, 1917, and at the said county of Cook, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money, with interest thereon, when the said defendant should be thereunto afterwards requested.

And whereas also said Otto Young died on November 30th, 1906, a resident of said city of Chicago, leaving a last will and testament and codicil thereto, which were duly admitted to probate, and which appointed plaintiff trustee thereunder, and contained the provisions hereinabove quoted, all as is more particularly set forth in the first count hereof; and whereas said Otto Young left him surviving his widow and four daughters, all as is more particularly set forth in the first count of this declaration, reference being made to said first count for the full particulars of all of said matters.

And that the said defendant afterwards, to wit, the 11th day of September, 1917, and at the said county of Cook, became and was indebted to the said plaintiff in the further sum of fifty thousand dollars (\$50,000.00) lawful money of the United States of America,

for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant, and at the like special request of the said defendant. And being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the 15th day of January, 1919, and at the said county of Cook, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas also said Otto Young died on November 30th, 1906, a resident of said city of Chicago, leaving a last will and testament and codicil thereto, which were duly admitted to probate, and which appointed plaintiff trustee thereunder, and contained the provisions hereinabove quoted, all as is more particularly set forth in the first count hereof; and whereas said Otto Young left him surviving his widow and four daughters, all as is more particularly set forth in the first count of this declaration, reference being made to said first count for the full particulars of all of said matters.

And that the said defendant, afterwards, to wit, on the 29 11th day of September, 1917, and at the said county of Cook, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of fifty thousand dollars (\$50,000.00) of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the 15th day of January, 1919, and at the said county of Cook, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said

defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of fifty thousand dollars (\$50,000.00), and therefore the said plaintiff brings suit, etc.

WILSON, MOORE, & McILVAINE,
Plaintiff's Attorneys.

Copy of Account Sued on.

Julius F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois.

To First Trust and Savings Bank, trustee under the last will and testament of Otto Young, deceased,

Dr.

To money had and received, to and for the use of said plaintiff,

\$50,000.00

30 STATE OF ILLINOIS, COUNTY OF COOK, ss.

LOUIS BOISOT being first duly sworn upon his oath deposes and says that he is vice-president of First Trust and Savings Bank, an Illinois corporation; that said First Trust and Savings Bank is trustee under the last will and testament and codicils thereto of Otto Young, deceased, and that he is duly authorized to make this affidavit in behalf of said bank and in its behalf as trustee, as aforesaid; that the demand of the plaintiff in the above entitled cause is for the return and repayment of internal revenue tax illegally assessed and collected from the plaintiff in respect to alleged income for the years 1913, 1914, and 1915, and paid by said plaintiff to said defendant under protest, the grounds of illegality being set forth in the above and foregoing declaration, which is hereby made a part hereof, and that there is now due from the defendant to the plaintiff after allowing all his just credits and set-offs, the sum of thirty-nine thousand six hundred sixty-seven and thirty-eight one-hundredths dollars (\$39,667.38).

LOUIS BOISOT.

Subscribed and sworn to before me this 21st day of January, A. D. 1919.

JOSEPH R. JULIN,
Notary Public.

[SEAL.]

(Endorsed) Filed Jan. 21, 1919, T. C. MacMillan, Clerk.

And on, to wit, the 19th day of February, 1919, come the defendant herein by his attorney and filed in the clerk's office of said court his certain demurrer to the declaration in words and figures following, to wit:

31 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

JULIUS F. SMETANKA, AS COLLECTOR OF
Internal Revenue of the United
States of America for the First Col-
lection District of Illinois,

vs.

FIRST TRUST AND SAVINGS BANK, TRUS-
tee under the last Will and Testa-
ment of Otto Young, deceased.

} Assumpsit No. 32992.

And the defendant, by Charles F. Clyne, his attorney, comes and defends, etc., and says that the said declaration as to the first, second, and third counts thereof, and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that he, the defendant, is not bound by law to answer the same, and this he is ready to verify;

Wherefore, for want of a sufficient first, second, and third count in said declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining his aforesaid action, etc.

CHARLES F. CLYNE,
United States Attorney.

(Endorsed) Filed Feb. 19, 1919, T. C. MacMillan, Clerk.

32 And on, to wit, the 15th day of July, 1919, come the plaintiff herein by its attorneys and filed in the clerk's office of said court its certain amendment to declaration in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION.

March Term A. D. 1919.

FIRST TRUST AND SAVINGS BANK TRUS-
tee under the last Will and Testa-
ment of Otto Young, deceased, plain-
tiff,

vs.

JULIUS F. SMETANKA, AS COLLECTOR OF
Internal Revenue of the United
States of America for the First Dis-
trict of Illinois, defendant.

} No. 32992.

AMENDMENT TO DECLARATION.

Now comes First Trust and Savings Bank, trustee under the last will and testament of Otto Young, deceased, plaintiff, in this suit, by Wilson, McIlvaine, Hale & Templeton, its attorneys, and by leave

of court first obtained amends the first three counts of the declaration herein as follows:

33 On page 3 of said declaration after the quotation from the will of Otto Young, deceased, insert the following:

"A copy of which said will of Otto Young, deceased, is attached hereto, marked Exhibit A, and made a part of each of the first three counts of this declaration."

WILSON, McILVAINE, HALE & TEMPLETON,
*Attorneys for First Trust & Savings Bank,
Trustee, under the last Will & Testament
of Otto Young, deceased.*

EXHIBIT A.

(Page One.)

I, Otto Young, do make this my last will and testament, hereby revoking all former wills and codicils thereto, as follows:—

First:—I direct that all debts owing by me be paid as soon as practicable after my death.

Second:—I direct my executor to pay all inheritance taxes and other charges of every kind and nature upon all the legacies, gifts and annuities given by this will, so that the full amount named in the several articles of this will shall be paid to the respective beneficiaries without any deduction being made therefrom.

Third:—I give, devise and bequeath to my wife, Ann Elizabeth Young, my residence and barn on the north-west corner of Twenty-first Street and Calumet Avenue, in the City of Chicago, and all the ground owned by me at the corner of said streets, together with the contents of said residence and barn; also my residence located at Lake Geneva, in Walworth County, in the State of Wisconsin, and all other real estate situated within two (2) miles of said last mentioned residence, and all my personal property situated in or about my said residence or on my other real estate within said two (2) miles of my said residence; also the shares of stock owned by me at the date of my death in the corporation organized under the laws of the State of Illinois and known by the name of Otto Young & Co.

Fourth:—I give, devise and bequeath all the rest, residue and remainder of my estate, of every kind and nature, to the First Trust and Savings Bank of Chicago, a corporation organized under the laws of Otto Young

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of the State of Illinois, and doing business in the City of Chicago, as trustee, for the uses and purposes, and with the powers following, to wit:

Said trustee shall have the power to sell and convey any real estate owned by me at the time of my death, or which may be owned by

the said trustee at any time during the continuance of the trust created by this will, except the south-west corner of Washington and State Streets, and the south-east corner of Madison and State Streets, extending about two hundred and eighty-five (285) feet on State Street south from the corner; also the premises known as Numbers four (184), one hundred and eighty-six (186), one hundred and four (184), one hundred and eighty-six (186), one hundred and eighty-eight (188) and one hundred and ninety (190) State Street, and one hundred and nine (109) and one hundred and eleven (111) Wabash Avenue, all in the said City of Chicago, at such prices and upon such terms as it may think best, and the purchasers need not see to the application of the purchase money. Said trustee shall also have full power to sell or retain all stocks or bonds owned by me at the time of my death and passing to said trustee under this will.

My said trustee is authorized to invest funds coming into its hands, subject to investment under the provisions of this will, in real estate in the City of Chicago, in high grade bonds or in high grade stocks of corporations, or in loans secured by real estate in the City of Chicago, and is also authorized to change said investments, from time to time, in its discretion. Said trustee is also authorized to execute leases of any real estate at any time belonging to the trust created Otto Young

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(Page Three.)

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by this will, including long ground leases, to insure, to improve, and to do all other acts in its judgment needful or desirable to the proper and advantageous management of said estate, so as to protect the same and make the same productive.

Out of the said trust estate, and the income derived therefrom I direct the following payments to be made by said trustee:

1st.—To my nephew, Claude Seymour, the sum of twenty thousand dollars (\$20,000.00).

35 2nd.—To the Chicago Orphan Asylum, situated on South Park Avenue, in the City of Chicago, the sum of twenty thousand dollars (\$20,000.00).

3rd.—To the Chicago Home for the Friendless, at Fifty-first Street and Vincennes Avenue, in the City of Chicago, the sum of twenty thousand dollars (\$20,000.00).

4th.—To the Old People's Home, at the corner of Thirty-ninth Street and Indiana Avenue, in the City of Chicago, the sum of ten thousand dollars (\$10,000.00).

5th.—To the Poor Handmaids of Jesus Christ, in the City of Chicago, the sum of ten thousand dollars (\$10,000.00).

6th.—To the Chicago Home for Incurables, a corporation organized under the laws of the State of Illinois, the sum of four hundred thousand dollars (\$400,000.00). The said legacy to be kept by said corporation as a separate fund, and the income derived therefrom applied and used by said corporation in maintaining the

building erected at my expense upon the grounds of said corporation, and in caring for persons afflicted with

Otto Young 3

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tuberc'losis who may occupy said buildings from time to time.

It is my will, and I direct, that in the event my said trustee shall be of opinion that it will be for the interest and benefit of my estate to postpone, for a time, the payment of the charitable bequests given by the foregoing clauses, numbered 2nd, 3rd, 4th, 5th and 6th, 2743—Schaap 13—

then and in such case such charitable bequests shall not be paid by the said trustee until such time, within three (3) years after my decease, as said trustee may think most advantageous for my estate, and in case of such postponement in payment, the said trustee shall pay interest upon the said charitable bequests or legacies, the payment of which shall be so postponed, at the rate of four per cent (4%) per annum, payable semi-annually from my death, for the time during which the payment of said charitable bequests or legacies shall be postponed.

7th.—I direct my said trustee, during the life time of my nephew, Albert Edward Mills, to pay for his use and benefit to the Bloomingdale Asylum at White Plains, New York, or to the proper
36 authorities of any other asylum in which my said nephew may from time to time be living or confined, a sum not exceeding twelve hundred dollars (\$1200.00) per annum in quarterly payments.

8th.—I direct my said trustee, upon the death of my sister Antonie Mills, or in case my said sister shall die before me than upon my death, to pay over to the proper authorities of any asylum in which her son Frederick Mills may be living or confined, for his use and benefit, a sum not to exceed seven hundred dollars (\$700.00) per annum, in such pay-

Otto Young 4

(Page Five.)

5

ments as may be required by said authorities, so long as said Frederick Mills shall continue demented.

9th.—I direct my said trustee to pay an annuity of one hundred thousand dollars (\$100,000.00) per annum to my wife, Ann Elizabeth Young, for and during her life, and in the event that one-third (1/3)

of the net income derived from the trust estate then in the hands of said trustee shall in any year exceed said sum of one hundred thousand dollars (\$100,000.00), the amount of such excess shall be paid to my said wife, provided she shall request such payment within sixty (60) days after the expiration of such year.

10th.—I direct my said trustee to pay an annuity of thirty-six thousand dollars (\$36,000.00) per annum to my daughter Mrs. Selmo Cecile Heyworth until the first day of January, 1910, and thereafter until the death of my wife, in case she shall be living on January 1st, 1910.

11th.—I direct my said trustee to pay an annuity of thirty-six thousand dollars (\$36,000.00) per annum to my daughter Marie Julia Kaufman, until the first day of January, 1910, and thereafter until the death of my wife, in case she shall be living on January 1st, 1910.

12th.—I direct my said trustee to pay an annuity of thirty-six thousand dollars (\$36,000.00) per annum to my daughter Catherine Osborne Hobart until the first day of January, 1910, and thereafter until the death of my wife, in case she shall be living on January 1st, 1910.

13th.—I direct my said trustee to pay an annuity of thirty-six thousand dollars (\$36,000.00) per annum to my

Otto Young

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daughter Laura Elizabeth Martin until the first day of January, 1910, and thereafter until the death of my wife, in case she shall be living on January 1st, 1910.

14th.—I direct my said trustee to pay an annuity of three thousand dollars (\$3,000.00) per annum to my sister, Mrs. Selma Eckhardt, for and during her life.

15th.—I direct my said trustee to pay an annuity of three thousand dollars (\$3,000.00) per annum to my sister Antonie Mills, for and during her life.

16th.—I direct my said trustee to pay an annuity of three thousand dollars (\$3,000.00) per annum to my sister Adele Verleye, for and during her life, and at her death I direct said trustee to pay to each of her two daughters, Alice and Adele, the sum of ten thousand dollars (\$10,000.00) out of the principal sum from which the annuity payable to said Adele Verleye was paid during her lifetime.

17th.—I direct my said trustee to pay an annuity of three hundred dollars (\$300.00) per annum to Mary Ann Bartlett, of Greenport, New York, for and during her life.

18th.—I direct my said trustee to pay an annuity of twenty-one hundred dollars (\$2100.00) per annum to my brother's widow, Mrs.

Max Young, for and during her life, and at her death I direct said trustee to pay to each of her two daughters Irma and Ava, the sum of ten thousand dollars (\$10,000.00) out of the principal sum from which the annuity payable to said Mrs. Max Young was paid during her lifetime.

19th.—I direct my said trustee, upon the death of my sister Mrs. Selma Eckhardt, to pay to her daughter, Antonie Massau, the sum

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of twenty thousand dollars (\$20,000.00) out of the principal sum from which the annuity payable to said Selma Eckhardt was paid during her lifetime.

Fifth:—From and after the death of my wife, but not before January 1st, 1910, the annuities of thirty-six thousand dollars (\$36,000.00) given to each of my daughters shall cease, and thereafter the following disposition of the net income of my estate shall be made:—

38 1st.—All annuities under my will (other than those hereinbefore given to my daughters) shall be paid as hereinbefore directed.

2nd.—Eighty-eight per cent (88%) of the remainder of said net income shall be paid over and divided between my daughters in equal shares.

3rd.—The other twelve per cent (12%) of such remainder shall be retained by said trustee and be added to and become a part of the principal of said trust estate.

If either of my daughters shall die, either before or after my decease, leaving no issue her surviving, her interest in said trust estate and in the income derived therefrom shall cease and determine at the date of her death, and the share thereof which she would have been entitled thereafter to receive if living shall go to the same persons and be held and distributed in the same manner as though such daughter had not survived me to take any interest under this will.

In the event that either of my daughters shall die, either before or after my decease, leaving issue her surviving, such issue shall be entitled to receive so long as they shall continue to survive, the

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same share of the net income of said trust estate which such deceased daughter would if living have been entitled to receive under the

provisions of this will, by way of annuity or otherwise; provided, however, that while such issue of either of my daughters shall be under the age of twenty-one (21) years such issue shall receive only a sum not exceeding six thousand dollars (\$6,000.00) per annum each, to provide for his or her education and maintenance, and the residue of his or her share belonging to him or her, as aforesaid, shall be retained by said trustee and accumulated by said trustee until such beneficiary shall attain the age of twenty-one (21) years, or the trust hereby created shall terminate, and at the happening of either of said events all such accumulations shall be paid over to said beneficiary, and in the event of the death of any such beneficiary before he or she shall arrive at the age of twenty-one (21) years and before the termination of this trust any accumulations of such beneficiary's share of the income of said trust estate shall be paid
 39 over to his or her issue, if any, and in default thereof to her brothers and sisters, if any, and if none the same shall fall into and become a part of the principal of the trust estate in the hands of said trustee.

Sixth:—When the last survivor of my daughters shall have deceased and the youngest surviving child of my daughters shall have attained the age of twenty-one (21) years all of said trust estate then remaining in the hands of said trustee shall be divided in equal shares between my grand-children, the surviving issue of any deceased grand-child to stand in the place of and receive the share which such deceased grand-child would have been entitled to receive if then living. Provid-

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ed, however, that if the period so fixed for the distribution of said trust estate shall arrive while any annuity is payable under the terms of his will to any person other than the issue of my daughters, a sufficient amount of said trust estate shall be retained in the hands of said trustee to provide for the payment of such annuity or annuities out of the income thereof until such annuity or annuities shall cease. The excess, if any, of the income of said trust estate, over and above the payments hereinbefore provided to be made therefrom, shall be accumulated in the hands of said trustee and form a part of the said trust estate, subject to the like control and power of disposition on the part of said trustee, as the principal of said trust estate. In case the net income derived from said trust estate in the hands of said trustee shall at any time be insufficient to pay in full all the annuities directed to be paid by this will, then and in such case the said annuities shall abate proportionately, so as to keep the annuities within the net income derived from the trust estate: Provided, how-

ever, that any accumulations of income in the hands of said trustee shall be used and exhausted in the payment of annuities before any abatement shall be made in the payment of annuities, and provided further that in no event shall the annuities given by this will to my sisters and to my sister-in-law be reduced in amount, but the same shall always be paid in full.

The annuities given and the payments directed to be made
40 by this will to my daughters and their issue are intended to provide for the comfortable support and maintenance of my

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daughters and their issue, and shall be paid over into the hands of said beneficiaries respectively, in person, and not upon any written or verbal order nor upon any assignment or transfer thereof by said beneficiaries, or by operation of law.

In case of a general conflagration, which shall destroy or greatly injure the buildings then standing upon the real estate in the hands of my trustee, I authorize my said trustee, after exhausting the personal property belonging to said trust estate, to borrow money for the purpose of making improvements upon said real estate, and to mortgage said real estate to secure the money so borrowed for said purpose, and to extend or renew any such loan or mortgage, and the mortgagee or lender need not see to the application of the purchase money, or the existence of the conditions upon which the power to mortgage is authorized. The said power to borrow money and mortgage shall only arise upon the happening of the condition above specified, viz: the general destruction of the buildings on the property in the hands of the trustee, and the exhaustion of the personal estate available for rebuilding purposes, and it is my desire that such borrowing of money and mortgaging of the property shall not take place if the trustee can make an advantageous lease of said property without making improvements thereon. And in the event of the borrowing of money as aforesaid, any surplus income not required to be paid to the annuitants under the terms of this will, shall be used from time to time in the reduction of the amount borrowed by said trustee as aforesaid; my daughters and their issue in

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such case to be paid only the annuities hereinbefore given to them during the life of my wife.

To the end that the necessity for borrowing money as aforesaid may be avoided so far as practicable I recommend (but
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do not make it obligatory) that said trustee keep in said trust estate about two million dollars worth of personal estate available for emergencies.

In the event that said trustee shall refuse to qualify or act, or further act as trustee under this will, for any cause, a successor in trust, or a new trustee, may be appointed by any court of competent jurisdiction, by and with the approval in writing of the appointee by not less than one-half ($1/2$) in number of my wife and children then living, and such new trustee so appointed shall have all the powers hereinbefore given to the original trustee named herein.

Seventh:—I direct that all annuities (and the income payable to my children and their issue) at any time under this will be paid quarterly, on the first days of January, April, July and October, in each year, the first payment to be made on whichever of said days first occurs after my death; and I further direct that on or before the first day of February in each year said trustee furnish to my wife and each of my adult children a statement of the condition of the trust estate on the preceding first of January; also showing the income therefrom during the preceding year, and the disposition thereof, and all changes in investments during such preceding year; and my wife and children shall also be permitted at all reasonable times to have access to the books showing the accounts of said

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trust estate, for the purposes of examination.

In making quarterly payments to my daughters and their issue after they become entitled to receive eighty-eight per cent (88%) of the residue of the net income of the trust estate remaining after the payment of annuities the trustee shall estimate as nearly as may be the net income of said estate at the date of each payment and adjust the accounts with each beneficiary after the expiration of the year, when the net income shall have been definitely ascertained, to the end that each beneficiary may receive quarterly payments as nearly as may be and at the same time each person receive ultimately the exact amount which he or she shall be entitled to under the provisions of this will.

42 Eighth:—I nominate and appoint the First Trust & Savings Bank of Chicago executor of this my last will and testament, and direct that no bond be required of such executor.

In Witness Whereof I have signed each page of this will in the margin thereof, and have hereunto set my hand and seal this fifth day of December, A. D. 1905.

OTTO YOUNG (Seal)

The foregoing instrument, consisting of twelve (12) typewritten pages, was, on the day of the date thereof, signed, sealed and declared by the said Otto Young to be his last Will and Testament, in the presence of us, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses to the execution thereof.

JOHN P. WILSON.
NATHAN G. MOORE.
HOUSTON C. ADCOCK.

Otto Young

Will proved and admitted to record in open court this 19th day of Feb. A. D. 1907.

CHARLES S. CUTTING,
Probate Judge.

State of Illinois,) ss. In the Probate Court of Cook County.
County of Cook. }

Proved and admitted to record in open court, this 19th day of Feby. A. D. 1907.

GUY GUERNSEY,
Clerk.

Filed, Dec. 15, 1906,
GUY GUERNSEY, *Clerk.*

(Codicil.)

I, Otto Young, of the City of Chicago, County of Cook and State of Illinois, do make the following codicil to my last will and testament, viz:

I give, devise and bequeath all my right, title and interest in and to Lot thirteen (13) and the North fifty-five and one-half (55 1/2) feet of Lot fourteen (14) in Culver and others' subdivision of lots two (2) and three (3) in block five (5) in William Jones' Addition to Chicago, in the County of Cook and State of Illinois, and in all improvements situated thereon, to my daughter, Selma Cecile Young Heyworth.

Except as modified by the foregoing provision of this codicil, I hereby ratify and confirm my last will and testament, to which the foregoing is a codicil.

In Witness Whereof I have hereunto set my hand and seal this 17th day of November, A. D. 1906.

OTTO YOUNG (Seal)

The foregoing instrument was, on the day of the date thereof, signed, sealed and declared by the said Otto Young to be a codicil to his last will and testament, in the presence of us, who, at his re-

quest and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

W. H. MACDONALD (Seal)

Lake Geneva, Wis.

CATHERINE W. TIERNEY. (Seal)

5944 Princeton Ave.,

Chicago, Ill.

Codicil proved and admitted to record in open court this 8th day of May, A. D. 1907.

CHARLES S. CUTTING,
Probate Judge.

County of Cook, }
State of Illinois, } ss. In the Probate Court of Cook County.

Codicil proved and admitted to record in open court this 8th day of May, A. D. 1907.

GUY GUERNSEY, *Clerk.*

Filed, Dec. 15, 1906,

GUY GUERNSEY, *Clerk.*

(Endorsed) Filed July 15—1919. John H. R. Jamar, Clerk.

(Endorsed) Will of Otto Young Trust Department First Trust and Savings Bank Chicago, Illinois

And on, to wit, the 22nd day of November, 1920, the following order was entered:

44

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION.

MONDAY, NOVEMBER 22, A. D. 1920.

Present: Honorable George T. Page, circuit judge.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER
the last will and testament of Otto Young,
deceased,

vs.

JULIUS F. SMJETANKA, AS COLLECTOR OF INTER-
nal Revenue of the United States of America,
for the First District of Illinois.

No. 32992.

ORDER.

This cause coming on to be heard this 22nd day of November, 1920, upon the petition of the plaintiff for leave to file a mandate in the United States Circuit Court of Appeals for the Seventh Circuit in

said cause, and plaintiff and defendant being properly before the court, it is hereby ordered that the said mandate be filed instanter.

It is further ordered that pursuant to the terms of said mandate, and in consonance with the opinion of said Circuit Court of Appeals, the general demurrer of the defendant to plaintiff's declaration and to each of the three counts thereof be and it is hereby overruled; and said defendant is ruled to plead within fifteen days from the date hereof.

Enter.

GEO. T. PAGE,
*Judge of the District Court of the United States for
the Northern District of Illinois, Eastern Division.*

And on, to wit, the seventh day of December, 1920, there was filed in the office of the clerk of said court in said entitled cause, the following election to stand by demurrer, in words and figures following to wit:

45 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVI-
SION.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER
the last will and testament of Otto Young,
deceased, plaintiff,

vs.

JULIUS F. SMETANKA, COLLECTOR OF INTER-
nal Revenue of the United States of America,
for the First District of Illinois, defendant.

D. C. No. 32992.

Comes now the defendant in the above entitled cause by Charles F. Clyne, United States attorney, and elects to stand by the demurrer to the declaration and the amendment thereto and each count thereof herein filed and heretofore overruled by the court.

CHARLES F. CLYNE,
United States Attorney.

(Endorsed :) Filed Dec. 7, 1920. John H. R. Jamor, clerk.

And on, to wit, the eighth day of December, 1920, in the record of proceedings thereof in said entitled cause before the Honorable George T. Page, Circuit Judge, the following judgment was entered:

46 IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

WEDNESDAY, DECEMBER 8, A. D. 1920.

Present: Honorable George T. Page, Circuit Judge.

FIRST TRUST AND SAVINGS BANK, TRUSTEE, UNDER THE last will and Testament of Otto Young, deceased, plaintiff,

vs.

JULIUS F. SMETANKA, AS COLLECTOR OF INTERNAL Revenue of the United States of America, for the First District of Illinois, defendant.

No. 32992.

JUDGMENT ORDER.

This cause coming on to be heard on the motion of plaintiff for judgment herein, and both parties being properly before the court, and it appearing to the court that the demurrer of defendant was heretofore overruled, and that defendant has elected to stand by his said demurrer,

Therefore judgment is hereby entered in favor of the plaintiff and against the defendant for principal sum claimed and interest, amounting in all to the sum of forty three thousand one hundred fifty three dollars and seventy five cents (\$43,153.75) and costs.

Entered.

GEO. T. PAGE, *Judge*.

And on, to wit, the sixth day of May, 1921, the following notice was filed:

47 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

FIRST TRUST AND SAVINGS BANK, TRUSTEE, UNDER LAST will and Testament of Otto Young, deceased, plaintiff,

vs.

JULIUS F. SMETANKA, AS COLLECTOR OF INTERNAL Revenue of the United States of America, for the First District of Illinois, defendant.

No. 32992.

NOTICE.

To Wilson, Moore & McIlvaine, 1605 Marquette Bldg., Chicago, Ill., Attorneys for Plaintiff:

You are hereby notified that on the opening of court on Wednesday morning, March 2, 1921, I shall appear before his honor, Judge

Page, in the room usually occupied by him as a court room in the Federal Building, Chicago, Illinois, and move for the allowance of a writ of error in the above-entitled cause and for leave to file petition for writ of error and assignments of error thereon.

CHARLES F. CLYNE,
United States Attorney.

Received a copy of the above notice
this 6th day of May, 1921.

Attorneys for Plaintiff.

And on, to wit, the seventh day of May, 1921, the following petition was filed:

48 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

FIRST TRUST AND SAVINGS BANK, TRUSTEE, UNDER LAST
Will and Testament of Otto Young, deceased, plaintiff,

vs.

JULIUS F. SMJETANKA, AS COLLECTOR OF INTERNAL REVENUE
of the United States of America, for the First District of Illinois, defendant.

No. 32992.

PETITION.

Now comes Julius F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois, your petitioner, defendant in the above-entitled cause, and respectfully shows that on the eighteenth day of July, A. D. 1919, the demurrer filed to the original declaration was, on motion of defendant, allowed to stand as demurrer to amended declaration in the above-entitled cause, and that on the twenty-second day of November, A. D. 1920, his demurrer was overruled by the court, and that judgment was pronounced upon said order overruling said demurrer on the eighth day of December, 1920, against your petitioner, by virtue of which said judgment your petitioner was ordered to pay to the plaintiff in the above-entitled cause the sum of forty-three thousand one hundred fifty-three dollars and seventy-five cents (\$43,153.75), and your petitioner respectfully shows that in the said judgment and the proceeding had prior thereunto in the above-entitled cause certain errors were committed to the prejudice of your petitioner, all of which will in more detail appear in the assignment of errors which is filed together with this petition.

49 Therefore, your petitioner, Julius F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois, prays that a writ of error may be issued in his behalf to the said district court, returnable to the next term of the United States Circuit Court of Appeals for the

Seventh Circuit, for correcting the errors so complained of, and that said writ of error may be made a supersedeas and that all further proceedings of said district court be suspended and stayed, and that all further and necessary orders and processes may be made to the end that the errors complained of may be corrected by said Circuit Court of Appeals for the Seventh Circuit of the United States, and that said judgment may be set aside and held for naught.

CHARLES F. CLYNE,

*United States Attorney. Attorney for Julius F. Smietanka,
Collector of Internal Revenue for the First District of Illinois.*
(Endorsed:) Filed May 7, 1921. John H. R. Jamor, Clerk.

And on, to wit, the seventh day of May, 1921, the following assignment of errors was filed:

50 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

FIRST TRUST AND SAVINGS BANK, TRUSTEE,
under Last Will and Testament of Otto
Young, Deceased, plaintiff,

vs.

JULIUS F. SMJETANKA, AS COLLECTOR OF INTER-
nal Revenue of the United States of America
for the First District of Illinois, defendant.

No. 32992.

ASSIGNMENT OF ERRORS.

Now comes the defendant, Julius F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois, by Charles F. Clyne, United States attorney for the Northern District of Illinois, and in connection with his petition for writ of error says, that in the record of the proceedings of the above entitled cause in said district court, error has intervened to his prejudice and this defendant would assign the following errors:

1st. The district court erred in overruling the demurrer to the declaration and each count thereof in the above-entitled cause.

2nd. The declaration and each count thereof in the above-entitled cause is insufficient upon the writ of error in the United States Circuit Court of Appeals, upon the ground that the matters and things alleged in said declaration and each count thereof, in manner and form, as the same are set forth in the said declaration and each count thereof are not sufficient in law for the plaintiff to maintain its aforesaid action.

51 3rd. The district court erred in entering judgment against the defendant in the sum of forty-three thousand one hundred fifty-three dollars and seventy-five cents (\$43,153.75).

Wherefore, the said Julius F. Smietanka, as said collector of internal revenue, by reason of the errors aforesaid, prays that the judg-

ment against him, the said Julius F. Smetanka, as collector of internal revenue of the United States of America for the first district of Illinois, may be reversed and held for naught.

CHARLES F. CLYNE,
United States Attorney.

(Endorsed:) Filed May 7, 1921. John H. R. Jamar, Clerk.

And on, to wit, the seventh day of May, 1921, the following order was entered:

52 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

SATURDAY, MAY 7, A. D. 1921.

Present: Honorable George T. Page, Circuit Judge.

FIRST TRUST AND SAVINGS BANK, TRUSTEE, UNDER LAST
Will and Testament of Otto Young, Deceased,
plaintiff,

vs.

No. 32992.

JULIUS F. SMETANKA, AS COLLECTOR OF INTERNAL
Revenue of the United States of America for the First
District of Illinois, defendant.

ORDER.

On motion of the United States attorney, appearing for said defendant, Julius F. Smetanka, as collector of internal revenue, etc.

It is ordered that a writ of error be, and the same is, hereby allowed to have reviewed in the United States Circuit Court of Appeals for this circuit the judgment heretofore entered herein on the eighth day of December, A. D. 1920, and that a citation issue returnable within thirty days from this date; and that said writ of error operate as a supersedeas.

Enter:

GEO. T. PAGE, *Judge.*

7th day of May, 1921.

53 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the District Court of the United States, for the Northern District of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, or some of you, between First Trust and Savings Bank, trustee, under last will and testament of Otto Young, deceased, and Julius

F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois, a manifest error hath happened, to the great damage of the said Julius F. Smietanka, as collector of internal revenue of the United States of America, for the first district of Illinois, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.]

JOHN H. R. JAMAR,
*Clerk of the District Court of the United States
for the Northern District of Illinois.*

Allowed by
GEORGE T. PAGE, *Judge.*

NORTHERN DISTRICT OF ILLINOIS, ss:

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 7th day of June, A. D. 1921.

[SEAL.]

JOHN H. R. JAMAR,
*Clerk United States District Court,
Northern District of Illinois.*

54 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Of the May Term, in the year A. D. 1921.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER THE
last will and testament of Otto Young, deceased,
plaintiff,

vs.

JULIUS F. SMJETANKA, COLLECTOR OF INTERNAL REVENUE,
United States of America, for the First District of
Illinois, defendant.

No. 32992.

PRAECIPE FOR RECORD.

*To the clerk of the United States District Court for the Northern
District of Illinois, Eastern Division.*

The clerk will make up a record in the above-entitled cause to file
in the United States Circuit Court of Appeals for the Seventh
Judicial Circuit, pursuant to the writ of error issued out of this court,
and will include in said record, the following:

- 55 1. Praecipe, summons and return.
2. Declaration.
3. Demurrer of the defendant to declaration.
4. Amendments to declaration.
5. Order of November 22, 1920, overruling demurrer of the de-
fendant.
6. Election of defendant to stand by demurrer.
7. Judgment order of December 8, 1920, against defendant.
7½. Notice.
8. Petition for writ of error and assignments of error.
9. Order allowing writ of error.
10. Clerk's certificate.

CHARLES F. CLYNE.

United States Attorney, Attorney for defendant.

(Endorsed:) Filed May 21, 1921. John H. R. Jamar, clerk.

56 Form No. 680. No. 32992. In the District Court of the
United States for the Northern District of Illinois, Eastern
Division. First Trust & Savings Bank, Trustee under the last will
and testament of Otto Young, deceased, vs. Julius F. Smietanka,
Collector of Internal Revenue, United States of America, for First
District of Illinois. Praecipe for record. Charles F. Clyne, U. S.
attorney.

I, John H. R. Jamar, clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with praecipe filed in this court in the cause entitled First Trust and Savings Bank, trustee, under last will and testament of Otto Young, deceased, vs. Julius F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois, as the same appear from the original records and files thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the city of Chicago, in said district, this 7th day of June, A. D. 1921.

[SEAL.]

JOHN H. R. JAMAR,
Clerk.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, contain a true copy of the original transcript of record, filed June 10, 1921, on which this cause was heard and determined in the case of Julius F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois vs. First Trust & Savings Bank, trustee under the last will and testament of Otto Young, deceased, No 2999, October Term, 1920, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit. In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this twelfth day of September, A. D. 1921.

[SEAL.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

59 . At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court room, in the city of Chicago, in said Seventh Circuit on the fifth day of October, 1920, of the October Term, in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

And afterwards, to wit, on the twenty-first day of June, 1921, in the October Term aforesaid, came the defendant in error, by its counsel, Mr. John P. Wilson, Mr. Wm. B. McIlvaine, Mr. John P.

Wilson, jr., Mr. William B. Hale, and Mr. Stuart J. Templeton, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to wit:

UNITED STATES OF AMERICA IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JULIUS F. SMJETANKA, COLLECTOR OF Internal Revenue, plaintiff in error, <i>vs.</i>	}	No. 2999.
FIRST TRUST AND SAVINGS BANK, TRUSTEE under the Last Will and Testament of Otto Young, deceased, defendant in error.		

APPEARANCE.

We hereby enter our appearance of First Trust and Savings Bank, trustee under the last will and testament of Otto Young, deceased, in the above-entitled cause, and our appearance as attorneys therein.

JOHN P. WILSON.
WM. B. McILVAINE.
JOHN P. WILSON, JR.
WILLIAM B. HALE.
STUART J. TEMPLETON.

Endorsed: Filed June 21, 1921. Edward M. Holloway, Clerk.

60 And afterwards, on the same day, to wit, on the twenty-first day of June, 1921, in the October Term last aforesaid, there was filed in the office of the clerk of this court a certain notice, which said notice is in the words and figures following, to wit:

UNITED STATES OF AMERICA, UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH JUDICIAL CIRCUIT.

JULIUS F. SMJETANKA, COLLECTOR OF INTERNAL REVENUE, plaintiff in error, <i>v.</i>	}	No. 2999.
FIRST TRUST AND SAVINGS BANK, AS TRUSTEE UNDER THE will of Otto Young, deceased, defendant in error.		

NOTICE.

To the United States District Attorney:

Please take notice that we shall, on Tuesday morning, June 21, 1921, at the opening of said court in the forenoon, or as soon thereafter as counsel can be heard, appear before the said Circuit Court of Appeals and move the court to enter judgment in the above-

entitled cause for the plaintiff (defendant in error) instanter, and without awaiting the filing of briefs or the making of arguments; at which time and place you may appear if you see fit.

WILSON, McILVAINE, HALE, AND TEMPLETON,
Attorneys for Defendant in Error.

Received a copy of the above notice this 20th day of June, A. D. 1921.

CHARLES F. CLYNE,
U. S. Atty.

Endorsed: Filed June 21, 1921. Edward M. Holloway, clerk.

61 And afterwards, on the same day, to wit, on the twenty-first day of June, 1921, in the October Term last aforesaid, there was filed in the office of the clerk of this court a certain motion, which said motion is in the words and figures following, to wit:

UNITED STATES OF AMERICA, IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

JULIUS F. SMETANKA, COLLECTOR OF INTERNAL REVENUE,
plaintiff in error,

vs.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER THE
last will and testament of Otto Young, deceased, de-
fendant in error.

No. 2999.

MOTION.

Now comes First Trust and Savings Bank, trustee under the last will and testament of Otto Young, deceased, defendant in error herein, and shows to the court that on July 18, 1919, judgment was entered in the above-entitled cause in the district court for the first district of Illinois sustaining plaintiff in error's general demurrer to defendant in error's amended declaration and dismissing defendant in error's suit;

That thereafter said cause was brought into this court by virtue of a writ of error, and that on October 5, 1920, the judgment of the said district court in said cause was reversed and said cause was remanded to the said district court for further proceedings in consonance with the opinion of this court;

That the mandate of this court was thereupon duly filed in said district court and that on November 22, 1920, the general demurrer of the plaintiff in error to defendant in error's amended declaration and to each of the three counts thereof was overruled,

62 and said plaintiff in error was ruled to plead within fifteen days from said 22nd day of November, A. D. 1920; that plaintiff in error elected to stand by his said demurrer, whereupon a final judgment was rendered on December 8, 1920, in said district court in favor of said defendant in error for the principal sum claimed, with interest, amounting in all to the sum of forty-three thousand one

hundred fifty-three dollars and seventy-five cents (\$43,153.75) and costs.

That this cause has again been brought to this court by virtue of a writ of error to the said district court.

Wherefore defendant in error herein prays this court to enter an order, without awaiting the filing of briefs or the making of arguments, affirming the judgment of district court in this cause, with costs, on the ground that all possible questions with reference to the matters here in issue were decided in the former hearing in this court.

FIRST TRUST & SAVINGS BANK,
*Trustee under the Last Will and
Testament of Otto Young, Deceased.*

By JOHN P. WILSON.
WM. B. McILVAINE.
JOHN P. WILSON, Jr.
WILLIAM B. HALE.
Its Attorneys.
STUART J. TEMPLETON.

JOHN P. WILSON.
WM. B. McILVAINE.
JOHN P. WILSON, Jr.
WILLIAM B. HALE.
STUART J. TEMPLETON.

*Attorneys for First Trust & Savings Bank,
Trustee under the last will and testament
of Otto Young, deceased.*

Endorsed: Filed June 21, 1921. Edward M. Holloway, clerk.

63 And afterwards, on the same day, to wit, on the twenty-first day of June, 1921, in the October Term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, JUNE 21, 1921.

Court met pursuant to adjournment and was opened by proclamation of clerk.

Present: Hon. Francis E. Baker, circuit judge, presiding; Hon. Samuel Alschuler, circuit judge; Hon. George T. Page, circuit judge. Edward M. Holloway, clerk; John J. Bradley, marshal.

JULIUS F. SMETANKA, AS COLLECTOR
of internal revenue of the United
States of America for the first dis-
trict of Illinois.

VS.

FIRST TRUST & SAVINGS BANK, TRUS-
tee under the last will and testa-
ment of Otto Young, deceased.

2999. Error to the Dis-
trict Court of the United
States for the Northern
District of Illinois, East-
ern Division.

On motion of counsel for defendant in error, it is now here ordered by this court that the judgment of the district court of the United States for the Northern District of Illinois, Eastern Division, in this

cause, be, and the same is hereby affirmed on the authority of the opinion of this court in cause No. 2743, First Trust & Savings Bank, trustee, etc. vs. Julius F. Smietanka, as collector, etc.

And afterwards, to wit, on the tenth day of September, 1921, in the October Term last aforesaid, the following further proceedings were had and entered of record, to wit:

64

SATURDAY, SEPTEMBER 10, 1921.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. George T. Page, circuit judge. Edward M. Holloway, clerk.

Before: Hon. Samuel Alschuler, circuit judge.

JULIUS F. SMIETANKA, AS COLLECTOR OF
internal revenue of the United States
of America for the first district of
Illinois,

vs.

FIRST TRUST & SAVINGS BANK, TRUSTEE
under the last will and testament of
Otto Young, deceased.

2999. Error for the Dis-
trict Court of the United
States for the Northern
District of Illinois, East-
ern Division.

On application of counsel for plaintiff in error, it is ordered that leave be, and the same is hereby, granted counsel for the plaintiff in error to withdraw from the files of this court the original transcript of the record in this cause for the purpose of using the same on application to the Supreme Court of the United States for a writ of certiorari.

65 UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 6, inclusive, contain a true copy of the proceedings had and papers filed in the case of Julius F. Smietanka, as collector of internal revenue of the United States of America for the first district of Illinois, vs. First Trust & Savings Bank, trustee under the last will and testament of Otto Young, deceased, No. 2999, October Term 1920, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twelfth day of September A. D. 1921.

[SEAL.]

EDWARD M. HOLLOWAY,

Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.

49

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Seventh Circuit, greeting:

Being informed that there is now pending before you a suit in which Julius F. Smietanka, collector of internal revenue, is plaintiff in error, and First Trust and Savings Bank, trustee under the last will and testament of Otto Young, deceased, is defendant in error, No. 2999, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of

Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the first day of November, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.]

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

51 In the Supreme Court of the United States. October term, 1921.

JULIUS F. SMJETANKA, COLLECTOR, PETITIONER,
v.

FIRST TRUST AND SAVINGS BANK, TRUSTEES, ETC.,
respondent. } No. 540.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Seventh Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.

JOHN P. WILSON,
Counsel for Respondent.

Nov. 3, 1921.

Endorsed: Filed Nov. 9, 1921. Edward M. Holloway, clerk.

UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Julius F. Smietanka, collector of internal revenue, plaintiff in error, vs. First Trust and Savings Bank, trustee under the last will and testament of Otto Young, deceased, defendant in error, No. 2999, is a full, true, and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this ninth day of November, A. D. 1921.

[SEAL.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

File No. 28,495. Supreme Court of the United States, No. 540, October term, 1921. Julius F. Smietanka, as collector, etc., vs. First Trust & Savings Bank, trustee, etc. Writ of certiorari. Filed Nov. 9, 1921. Edward M. Holloway, clerk.

52 File No. 28495. Supreme Court U. S. October term, 1921. Term No. 540. Julius F. Smietanka, collector, petitioner, vs. First Trust & Savings Bank. Writ of certiorari and return. Filed Nov. 14, 1921.

○

FILED
JAN 13 1922
WM. R. STANSBURY
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 540

JULIUS F. SMIETANKA, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF ILLINOIS,

Petitioner,

vs.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

JOHN P. WILSON,
WILLIAM B. HALE,
WALTER BRUCE HOWE,
Attorneys for Respondent.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 540.

JULIUS F. SMIETANKA, AS COLLECTOR OF INTERNAL
REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT
OF ILLINOIS,

Petitioner,

vs.

FIRST TRUST AND SAVINGS BANK, TRUSTEE UNDER
THE LAST WILL AND TESTAMENT OF OTTO YOUNG, DE-
CEASED.

BRIEF FOR RESPONDENT.

STATEMENT.

The question presented for decision in this case is whether or not the Income Tax Act of 1913 levied a tax on income held and accumulated in the hands of the First Trust and Savings Bank, of Chicago, as trustee, for the benefit of unborn or unascertained persons.

The amounts levied and collected by the Government upon the income so accumulated for unascertained persons are as follows:

Taxes for the year 1913.....	\$10,915.24
Taxes for the year 1914.....	14,126.88
Taxes for the year 1915.....	11,596.57
Total	<u>\$36,638.69</u>

The defendant as trustee filed in the office of the Collector of Internal Revenue of the United States for the First District of Illinois, at the dates required by the act, a return of the income received by it during each of the years 1913, 1914 and 1915 in the form prescribed for returns by fiduciaries. These returns showed the several amounts of income paid or accrued to each beneficiary, and the amount of income retained and accumulated under the terms of the will.

Upon said returns the Commissioner of Internal Revenue determined that there was accumulated in the hands of the plaintiff in error, as trustee, the following sums:

For the year 1913 (subsequent to March

1st) \$221,611.05

For the year 1914 281,940.45

For the year 1915 286,354.15

All of these sums were accumulated and added to the capital of the trust in the hands of the trustee under the Sixth Article of the will of Otto Young for the benefit of his grandchildren who may survive at the termination of the trust, and no part thereof can be distributed to any beneficiary during the life of the trust.

No attempt was made to levy or collect any income tax upon these accumulated funds until after July 26, 1915. Income taxes were then assessed upon said accumulated funds against the trustee under the instructions issued by the Commissioner of Internal Revenue on July 26, 1915, hereinafter set forth. The taxes so levied were computed by the Collector upon the basis of treating the entire accumulation in each year as a separate entity, liable for the same normal and surtaxes as an individual receiving a like income would be liable for under the Act of 1913.

The taxes so levied were paid under protest, and upon suit brought to recover back the taxes so paid judgment

was rendered in favor of the trustee, upon the ground that the Internal Revenue Law of 1913 did not levy any tax upon the income so accumulated and remaining in the hands of the trustee.

The clauses of the Act of 1913 which levy income tax are as follows:

"A. SUBDIVISION 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year

to every citizen of the United States, whether residing at home or abroad,

and to every person residing in the United States, though not a citizen thereof,

a tax of 1 per centum per annum upon such income, except as hereinafter provided;

and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.

SUBDIVISION 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of *every individual* an additional income tax (herein referred to as the additional tax) of

1 per centum per annum upon the amount by which the total net income exceeds \$20,000 and does not exceed \$50,000," etc.

"G. (a) That the normal tax herein before imposed upon *individuals* likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint stock company or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships."

The foregoing paragraphs contain all the provisions of the original Act of 1913, which, in terms, levies or imposes a tax upon income. Under separate headings, designated by capital letters, provisions are made for ascertaining the income to be taxed, for deductions, exemptions, returns, etc., as follows:

"B" This paragraph defines "*the net income of a taxable person*," and specifies the deductions to be made in computing the income subject to the tax.

"C" This paragraph specified the amount to "*be deducted from the amount of the net income of each of said persons*" as an exemption.

"D" This paragraph directs the income tax to be computed "*upon the remainder of said net income of each person subject thereto*," and provides for the making of returns of income as follows:

"On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate return, under oath or affirmation, shall be made by each person of lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of \$3,000 or over for the taxable year, to the collector of internal revenue for the district in which such person resides or has his principal place of business, or, in the case of a person residing in a foreign country, in the place where his principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth specifically the gross amount of income from all separate sources and from the total thereof, deducting the aggregate items or expenses and allowances herein authorized;

guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and

management, and be subject to all the provisions of this section which apply to individuals:

and also all persons, firms, companies, copartnerships, corporations, joint stock companies or associations, and insurance companies, except as hereinafter provided, in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or periodical gains, profits, and income of another person subject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing also the name and address of such person or stating that the name and address or the address, as the case may be, are unknown:"

"E" This paragraph provides for the making of assessments of income tax by the Commissioners, and that all "persons should be notified of the amount for which they are respectively liable."

Paragraph E also provides for withholding the normal tax at the source, as follows:

"All persons, firms, copartnerships, companies, corporations, joint-stock companies or associations, and insurance companies, in whatever capacity acting, including

lessees or mortgagors of real or personal property, trustees acting in any trust capacity,

executors, administrators, agents, receivers, conservators,

employers,

and all officers and employees of the United States having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits, and income of another person, exceeding \$3,000 for any taxable year,

other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax,

who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her or its district,

are hereby authorized and required to deduct and withhold from such annual gains, profits, and income such sum as will be sufficient to pay *the normal tax* imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same;

and they are each hereby made personally liable for such tax." (Italics ours.)

"The provisions of this section relating to the deduction and payment of the tax at the source of income *shall only apply to the normal tax hereinbefore imposed upon individuals.*" (Italics ours.)

"F" This paragraph provides for penalties to be paid by "any person, corporation, joint-stock company, association, or insurance company liable to make the return or pay the tax" in case of refusal or neglect, etc.

Vol. 38, U. S. Statutes, pp. 166-170.

RULINGS OF THE TREASURY DEPARTMENT.

In Administering the Act of 1913 the Treasury Department published the following extract of a letter from Deputy Commissioner Speer dated February 9, 1915 (Corporation Trust Co. Income Tax Service 1915, p. 426):

"* * * where, under the express provisions of a will or of State laws, certain income passes into the *corpus* of an estate, to go eventually with the estate to the persons entitled in remainder, the income tax does not attach to, and is not collectible from, the specified income at the time of its receipt by the Executor, whether or not the remaindermen are determinable.

The income tax can be levied only on such income as is *payable* to some natural or artificial person subject to the provisions of the law.

No return is required to be made at the time, therefore, of the gains and profits that pass into the *corpus* of an estate under the provisions of State laws."

Extract from Treasury Decision 1906:

"Fiduciaries having an annual income *not distributed or paid to the beneficiaries* of the trust under which said fiduciary acts shall make an annual list return, as provided herein, and said list return shall show the name and address of each beneficiary having a distributive interest in said income in excess of \$3,000, stating the distributive amount of each beneficiary, and shall give all information as required in said list returns, and *shall withhold and pay to the collector, as provided by law, the normal tax of 1 per cent upon the distributive interest of each of said beneficiaries in excess of \$3,000, the same as if said income was actually distributed and paid*; exemption under paragraph C, however, may be claimed by the beneficiary or his legal representative by filing his claim for exemption with the fiduciary agent.

When the fiduciary agents deduct, withhold, and pay the normal tax on *undivided annual net income* as provided herein, they shall not be required to withhold and pay again the normal tax on said income when actually distributed and paid to said beneficiaries, nor shall the beneficiaries be required again to pay the normal tax on the amounts on which the tax has been paid when such amounts are distributed."

T. D. 1943:

"The amount to be shown on page 1, line (5), will represent the total amount of income accruing through the fiduciary to the beneficiaries of the estate or trust *which is subject to the normal tax*, and when the interest of any one beneficiary in this amount was in excess of \$3,000, *whether distributed or not, the fiduciary was required to withhold and*

pay the normal tax on the whole \$3,000 and excess thereof, unless the beneficiary filed with the fiduciary Form 1007, as prescribed by the regulations, claiming exemption under paragraph C, and in that event the fiduciary was only required to withhold and pay the normal tax on the amount in excess of the exemption claimed."

The Commissioner under the act also made the following rulings:

"No return required of fiduciary unless some one beneficiary's interest, subject to the normal tax, exceeds \$3,000."

Dated January 15, 1915.

"A return of income by a fiduciary is required if the distributive interest of any one beneficiary in the amount entered on line 5, page 1, of form 1041 revised, exceeds \$3,000."

Income Tax Service 1915, pp. 379-396.

On July 26, 1915, the Commissioner of Internal Revenue issued new instructions in regard to the assessing and collecting of income taxes, which for the first time sought to enforce a tax upon income accumulated for unascertained persons in the hands of trustees as an entity, which instructions are, in part, as follows (Corporation Trust Company Income Tax Service 1915, p. 493):

"Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of \$3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed \$20,000. In such cases the

estate shall be reported as a beneficiary for the undistributed income.

Notice of failure to file a return as required shall be served upon the fiduciary.

* * * * *

The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate, the fiduciary will withhold the normal tax due and subject to withholding by him. Any part of the annual income of trust estates not distributed becomes an entity, and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not *in esse* and the income of the estate is retained by the fiduciary such income will be taxable to the estate as for an individual and the fiduciary will pay the tax both normal and additional. When the beneficiary receives a part only of the income to which he is entitled from the estate and the balance is retained by the fiduciary, the normal tax will be withheld on the income paid to the beneficiary and the amount of such income retained by the fiduciary will be treated as income taxable to the estate for both the normal and additional tax; which tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary is less than \$20,000, the estate will be listed as a beneficiary and only the normal income tax will be assessable and such tax will be paid by the fiduciary. When the gross net income not distributed and remaining in the hands of a fiduciary exceeds \$20,000, such income is subject to both the normal and additional tax and the estate will be listed as a beneficiary and both the normal and additional tax will be paid by the fiduciary.

* * * Treasury Decisions 1906 and 1943 and Articles 70, 71, 74 and 75 of Regulations 33 and all other regulations so far as inconsistent herewith are hereby superseded."

THE ACT OF 1916.

By an act approved September 8, 1916, the Income Tax Act of 1913 was revised, and the following new provision was added:

"SEC. 2 (b) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and *also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: Provided, That where the income is to be distributed annually or regularly between existing heirs or legatees or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.*

Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries."

The Act of 1916 also provides:

"SEC. 8 (c) Guardians, trustees, executors, administrators, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals. Such fiduciary shall make oath that he has sufficient knowledge of the affairs of such person, trust, or estate

to enable him to make such return and that the same is, to the best of his knowledge and belief, true and correct, and be subject to all the provisions of this title which apply to individuals:"

Vol. 39, U. S. Statutes, pp. 757-762.

THE INTERNAL REVENUE ACT OF 1918.

This act has the following provisions relating to the taxation of income in the hands of fiduciaries:

"ESTATES AND TRUSTS.

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that there shall also be allowed as a deduction (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any

corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraph (1), (2), or (3) of subdivision (a) the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216."

"FIDUCIARY RETURNS.

SEC. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is \$1,000 or over if single or if married and not living with husband or wife, or \$2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is \$1,000 or over, or if any beneficiary of such estate or trust is a nonresident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or

trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this act shall be subject to all the provisions of this act which apply to individuals." (p. 1074.)

Vol. 40 U. S. Statutes, p. 1071-1074.

ARGUMENT.

The Act of 1913 levied the income tax only on persons, and not on property. The persons taxed were only those receiving income in their own right. No tax was levied upon income apart from the person beneficially entitled thereto. The paragraphs of the act levying or imposing the income tax are separate and distinct from the provisions of the act which provide for the method of ascertaining the taxable income, and assessing and collecting the same. The clauses so levying the income tax are contained in paragraphs "A" and "G," and are set forth *ante*, page 3.

Paragraphs "B," "C," "D," "E" and "F" specify and define the methods of ascertaining the taxable income and making returns thereof, and the collection of the same.

The subject matter of these later paragraphs does not include the imposition of a tax upon any income.

It is sought in this case to sustain the taxes in question under a clause contained in paragraph "D," which provides for the making of returns by trustees

"of the net income of the person for whom they act, *subject to this tax*, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals."

This clause not only does not in terms impose a tax upon income, but limits the obligation imposed to the making of a return of income "subject to this tax"; *i. e.*, income which is taxable under paragraph "A" or paragraph "G."

I.

RULE OF CONSTRUCTION.

"THERE MUST BE CERTAINTY AS TO THE MEANING AND SCOPE OF LANGUAGE IMPOSING ANY TAX, AND DOUBT IN RESPECT TO ITS MEANING IS TO BE RESOLVED IN FAVOR OF THE TAX-PAYER."

Treat v. White, 181 U. S. 264, 267.

This proposition is so clearly established by the decisions of this court as not to admit of doubt or question.

In the recent case of *United States v. Field*, 255 U. S. 257, this court affirmed the above principle as an accepted canon of construction, citing *Gould v. Gould*, 245 U. S. 151, 153, where this court said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to *enlarge their operations so as to embrace matters not specifically pointed out*. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

II.

THE CASE OF THE MERCHANTS' LOAN & TRUST COMPANY V. SMETANKA (255 U. S. 509), IS NOT AN AUTHORITY IN SUPPORT OF THE GOVERNMENT'S CONTENTION IN THIS CASE THAT A TRUSTEE IS TAXABLE UPON ACCUMULATED INCOME UNDER THE ACT OF 1913.

This case is cited as an authority in support of the Government's contention. (Arg., pp. 9, 10.)

The question at issue here was not involved, discussed or decided in *The Merchants' Loan & Trust Company* case. The question at issue in that case was whether a gain from capital realized by a sale was taxable as in-

come. The case arose under the Internal Revenue Acts of September 8, 1916, and October 13, 1917, which specifically provided for the taxation of accumulated income in the hands of trustees.

In its opinion the court found from the provisions of the Acts of 1916 and 1917 that

"it is the plainly expressed purpose of the Act of Congress to treat such a trustee as we have here as a 'taxable person,' and for the purposes of the Act to deal with the income received for others precisely as if the beneficiaries had received it in person." (p. 517.)

This conclusion is based upon two clauses or paragraphs quoted in the opinion of the court from the Acts of 1916 and 1917, as follows:

"That the trustee was such a 'taxable person' is clear from section 1204 (1) (c) of the Act of October 3, 1917, c. 63, 40 Stat. 331, which requires that 'trustees, executors * * * and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals.'

And section 2 (b) of the Act of September 8, 1916, *supra*, specifically declares that the 'income received by estates of deceased persons during the period of administration or settlement of the estate, * * * or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be.' " (pp. 516-517.)

In the Government brief the above clause of the Act

of October 3, 1917, only is quoted, and the statement is made that

"In respect to the question whether or not a trustee is a taxable person, the provisions quoted by the court from the Act of October 3, 1917, and the provisions of the Act of 1913 here relied upon are practically identical."

We do not assent to the correctness of this statement.

The following are quotations of the clause in question in the respective Acts of 1913 and 1917. The words in italics in Act of 1913 are stricken out by the amendment, and the words in italics in the Act of 1917 are new.

Act of 1913:

"Guardians, trustees, executors, administrators, *agents*, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the *net* income of the person for whom they act, *subject to this tax, coming into their custody or control and management*, and be subject to all the provisions of this *section* which apply to individuals."

Act of 1917:

"Guardians, trustees, executors, administrators, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the income of the person, *trust or estate* for whom or *which* they act, and be subject to all the provisions of this *title* which apply to individuals."

Under the Act of 1917 the duty of the fiduciary was not limited to the making of "a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management," but was extended so as to require the trustee to render "a return of the income of the person, trust or estate for whom or which they act."

The addition of the words "trust or estate" was made by the amendment of 1916, which in specific terms levied a tax upon the income accumulated in the hands of a trustee for the benefit of unascertained persons, and directed such tax to be assessed to the trustee. The changes by the Act of 1916 for the first time made it the duty of the trustee to return income accumulated for unascertained persons and to pay income taxes thereon.

It is entirely clear that the question as to whether a trustee holding accumulated income was a taxable person under the Acts of 1916 and 1917, which in specific terms provided for the taxation of such income to the trustee, was entirely different from the same question under the Act of 1913, which contained no specific provision for the taxation of such accumulated income, and contained no provision authorizing the trustee to pay a tax on such income.

The Merchants' Loan & Trust Company case not only arose under the Acts of 1916 and 1917, but the court's decision was specifically based upon the provisions of said two acts under which there was no room for doubt or difference of opinion as to the trustee being a taxable person.

III.

THE CONTENTION OF THE GOVERNMENT THAT

"THE FIDUCIARIES REQUIRED TO MAKE REPORTS ARE THOSE WHO RECEIVE INCOME FOR THE PURPOSE OF GUARDING AND PRESERVING IT, AND EXERCISING A CONTINUING CONTROL OVER IT, NOT THOSE WHO MERELY DISPOSE OF IT. THE LAW, IN OTHER WORDS, APPLIES TO TRUSTEES WHO ACCUMULATE, OR AT LEAST DO NOT IMMEDIATELY DISBURSE, THE TRUST INCOME WHICH THEY RECEIVE," IS NOT SUSTAINABLE. (Arg., p. 12.)

The above proposition is essential to the government's

case. The claim made is that a tax is levied upon accumulated income by the clause of the act which provides that fiduciaries "shall be subject to all the provisions of this section which apply to individuals."

This clause is general in its terms, and is applicable to all returns required to be made by fiduciaries. If the clause is construed to require fiduciaries to make return in all cases of the net income received by them from trust funds, it would follow from the government's contention that double income taxes would be collected in most cases—first, from the trustee, and, second, from the beneficiary receiving the net income from the trustee. The government is, therefore, forced to the position taken, that the Act of 1913 required fiduciaries to make a return of income *only* in cases where such income was retained by the trustee and not paid over to a beneficiary. Is this position tenable?

The paragraph in which the clause in question occurs is as follows:

"guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals:

• • •
 and also all persons, firms, companies, copartnerships, corporations, joint-stock companies or associations, and insurance companies, except as herein-after provided, in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or periodical gains, profits, and income of another person subject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a re-

turn, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing also the name and address of such person or stating that the name and address or the address, as the case may be, are unknown:" (Italics ours.)

The contention is made that the second clause of the above paragraph, commencing with the words "and also all persons, firms," etc., does not include the fiduciaries named in the first clause, viz: "guardians, trustees, executors," etc., and that therefore fiduciaries were not required to make a return of incomes paid over by them to the beneficiaries, and to state in their return the name and address of each beneficiary. It is claimed that a distinction is made in the statute between fiduciaries having the control and management of income and disbursing agents. (Arg., pp. 12-16.) This distinction involves the proposition that fiduciaries were not required by the Act of 1913 to make return of distributable income, or to pay and withhold the normal tax thereon. The distinction can only be upheld by holding that the second clause above mentioned does not include the fiduciaries included within the first clause.

But the description of the persons falling within the second clause is as comprehensive as language could make it. "All persons * * * in whatever capacity acting, having the control, receipt, disposal or payment * * * of income of another person, subject to tax, shall in behalf of such person deduct," etc.

A trustee or fiduciary receiving income from a trust fund and paying it over to a beneficiary falls clearly and specifically within the language used. But if there were any doubt it is removed by paragraph "E," in which the description of the persons designated is identical with that in the second clause, and which specifically provides

that the persons so designated shall include "lessees, mortgagors of real or personal property, *trustees acting in any capacity, executors, administrators, agents, receivers, conservators*, employers, and all officers and employees of the United States having the control, receipt, custody, disposal or payment * * * of income of another person."

Paragraph "E" specifically requires trustees acting in any capacity to deduct and withhold the normal tax on trust income, and to pay the same to the collector, and they are made personally liable for such tax; that is to say, a trustee paying income to a beneficiary was, by the Act of 1913, requiring to withhold an amount equal to the normal tax from the payments made to the beneficiary, and to pay the amount so withheld to the collector. This withholding and payment was required to be evidenced by the sworn return made by the trustee under the clause in paragraph "D" above quoted specifically stating the name of the beneficiary on whose behalf payment is made.

The Treasury Department, under its regulations and forms, has always required trustees and other fiduciaries to make returns of all income received from trust funds which were distributable or payable to beneficiaries.

By T. D. 2090 it was provided:

"Fiduciaries are required to make a return on Form 1041, revised, whenever the interest of any one beneficiary in the income from the estate or trust subject to the normal tax is in excess of \$3,000. This duty can not be delegated to another person. When the interest of any one beneficiary exceeds \$3,000 and a return is required, the name and full address of each beneficiary and the share of income to which entitled even though it be less than \$3,000, must be shown; and in all cases where the beneficiary's interest is in excess of \$3,000 the fiduciary

is required to withhold the normal tax unless exemption is claimed under paragraph C, and then only on the amount in excess of the exemption so claimed."

By T. D. 2137 it was provided:

"A return of income by a fiduciary is required if the distributive interest of any one beneficiary in the amount entered on line 5, page 1, of Form 1041, revised."

Under the instructions printed on Form 1041 every fiduciary was required to make a return when the annual interest in any income accruing and payable to any beneficiary through such fiduciary exceeded \$3,000.

Under the statute of 1913, and every amendment thereto, and under the statutes and regulations in force at all times since 1913, fiduciaries have been required to make a return of the income of trust funds in their hands where the same were payable to known beneficiaries and to give the names of the beneficiaries and the amount of income payable to each beneficiary.

Article 341 of Regulations under the Act of 1918 provides:

"While certain estates and trust are subject to tax as such and others are not, the fiduciary in every case is required to make a return of income."

IV.

THE ORIGINAL RULING OF THE TREASURY DEPARTMENT THAT

"THE INCOME TAX CAN BE LEVIED ONLY ON SUCH INCOME AS IS PAYABLE TO SOME NATURAL OR ARTIFICIAL PERSON, SUBJECT TO THE PROVISIONS OF THE LAW," WAS CORRECT.

This ruling was made in a letter by Deputy Commissioner Speer, dated February 9, 1915, published by the Treasury Department. On July 26, 1915, the Commis-

sioner of Internal Revenue issued new instructions, which for the first time sought to levy a tax upon income accumulated for unascertained persons in the hands of trustees as an entity. (*Ante*, page 8.) These instructions were in part as follows:

"Any part of the annual income of trust estates not distributed becomes an entity, and as such is liable for the normal and additional tax which must be paid by the fiduciary."

Mr. Justice Baker, in delivering the opinion of the Circuit Court of Appeals, in passing upon these rulings of the Treasury Department, said:

"The department's first rulings were in harmony with the natural import of the language used by Congress; its later ruling does more than violate the canon that doubts and ambiguities are to go against the government, for it is based, not upon any uncertainty in the terms of the act, but upon a metamorphosis of a body of property into a person, and upon exactions contrary to the exemptions in the Act of 1913."

And again,—

"Our reading of the act accords with the many and uniform rulings of the Treasury Department from the passage of the act down to July 26, 1915. Treas. Dec. No. 1906, issued November 28, 1913; Income Tax Regulations No. 33, Articles 70, 71, 74 and 75, issued January 5, 1914; Treas. Dec. No. 1943, issued February 4, 1914; Treas. Dec. No. 2090, issued December 14, 1914; Rulings on January 15 and 30, and February 9 and 27, 1915, in Income Tax Service 1915, on pages 379, 396, 426, 438; and the opinion of the Attorney General rendered to the Treasury Department on February 12, 1914, in Income Tax Service 1914 at page 260."

In September, 1916, the Income Tax Act of 1913 was revised and a new provision was added. Section 2 (b), hereinbefore quoted, which directed the tax "to be as-

assed to the executor, administrator or trustee," and not to the accumulated income as an entity.

This narration makes it clear that the Act of 1913 did not clearly and specifically tax accumulated income held for unascertained persons. The subject matter in controversy arose immediately after the Act of 1913 went in force. No claim was made by the government that income taxes were levied on such accumulated income until July 26, 1915, more than two years after the act was in operation, and in the meanwhile the Treasury Department had ruled that such income was not subject to tax under the provisions of the law.

The Act of 1916 was clearly passed for the purpose of supplying the omission, and provided for the levy of taxes upon such accumulated income.

The case is strikingly similar to the case of *United States v. Field*, 255 U. S. 257, in which the omission to levy an estate tax upon property passing under a general power of appointment, was sought to be remedied—first, by a ruling or instruction of the Treasury Department, and, secondly, by an amendment of the statute specifically taxing property passing under a general power of appointment.

In that case the government sought to sustain a tax levied before the amendment by contentions similar to those made in this case. The tax was held unauthorized, the court saying:

"It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (sec. 402 (e), 40 Stat. 1097): 'To the ex-

tent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except,' etc. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment." (pp. 264-5.)

In this case it would have been easy for Congress to have made a specific provision taxing accumulated income for unascertained persons. This was done by the amendatory act, and the amendatory act was clearly passed because Congress was at least doubtful whether the existing act imposed a tax upon such accumulated income.

It is clear that by its contention the government seeks to extend the import of the language used in the Act of 1913 so as to embrace matters not specifically pointed out. At the very least there is grave doubt as to whether the construction contended for by the government can fairly be applied to the Act of 1913, and in such case the rule is that the doubt must be resolved against the government and in favor of the citizen.

V.

THE TAX IN QUESTION CANNOT BE SUSTAINED ON THE GROUND THAT ITS LEVY FALLS WITHIN THE GENERAL PURPOSE OF THE ACT.

The argument is pressed that it was the intention of Congress to levy the income tax upon all income, and that the act should be so construed as to carry out this general intention on the part of Congress.

This same contention was made by the government and overruled by this court in the case of *United States*

v. *Field, supra*, in which it was claimed that it was the general intention of Congress to levy an estate tax on all property passing from one person to another by reason of death, and that, therefore, property passing under a general power of appointment should be taxed.

If there are clear and express words contained in the act levying an income tax upon accumulated income, there is no need of resorting to conjecture in regard to the general intention of Congress in passing the act. On the other hand, if there are no clear and express words in the act levying the tax, it cannot be sustained on any conjecture as to the intention of Congress. The words of the act

“* * * must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source.”

Caminetti v. United States, 242 U. S. 470, 490.

“The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture.”

Thompson v. United States, 246 U. S. 547-551.

“* * * the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language.”

Eidman v. Martinez, 184 U. S. 578.

It is contended that Congress could not have intended that accumulated income of trust funds should be exempt from taxation. It is not sufficient to sustain the tax to find that Congress had no affirmative or conscious intention to omit accumulated income from income taxes. It is sufficient to defeat the tax that Congress did not af-

firmatively provides specifically for the taxation of accumulated income. A case of omission by oversight is sufficient to defeat the tax. We respectfully submit that there is no specific language in the Act of 1913 which clearly imposes a tax upon accumulated income for unknown persons in the hands of trustees, and that the judgment of the court below should be affirmed.

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APPENDIX.

Opinion of the Circuit Court of Appeals, Seventh Circuit, in the case of *First Trust & Savings Bank v. Smietanka, Internal Revenue Collector*:

- “BAKER, *Circuit Judge*. Plaintiff in error, as trustee under the will of Otto Young, filed a declaration to recover income taxes assessed against the estate under the Internal Revenue Act of October 3, 1913 (38 Stat. 167), and paid under protest. A general demurrer was sustained, and judgment for costs followed.

Otto Young's will, after disposing of portions of the income during the lives of his widow and four daughters and until his youngest surviving grandchild should attain the age of 21, provided:

‘6. When the last survivor of my daughters shall have deceased and the youngest surviving child of my daughters shall have attained the age of twenty-one years, all of said trust estate then remaining in the hands of said trustee shall be divided in equal shares between my grandchildren, the surviving issue of any deceased grandchild to receive the share which such deceased grandchild would have been entitled to receive if then living. * * * The excess, if any, of the income of said trust estate, over and above the payments hereinbefore provided to be made therefrom, shall be accumulated in the hands of said trustee and form a part of said trust estate, subject to the like control and power of disposition on the part of said trustee as the principal of said trust estate.’

If a decedent's estate produces an increment which is payable only at times and to persons not now determinable, is such increment during a tax year an

income of that tax year, which is assessable under the Internal Revenue Act of October 3, 1913? Provisions essential to the answer are as follows:

Paragraph A, subd. 1: 'There shall be levied * * * and collected annually (a tax) upon the entire net income * * * accruing from all sources in the preceding calendar year.

(1) To every citizen of the United States, whether residing at home or abroad, and

(2) To every person residing in the United States, though not a citizen thereof * * * and

(3) A like tax * * * upon the entire net income from all property owned and of every business, trade or profession carried on in the United States by persons residing elsewhere.'

Paragraph A, subd. 2: 'In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied * * * and collected upon the net income of every individual an additional income tax of * * *'

Paragraph B: 'Subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include * * * income * * * growing out of * * * interest in real or personal property * * * and income derived from any source whatever.'

Paragraph D: 'Guardians, trustees, * * * and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals.'

Paragraph E: After providing for withholding the normal tax at the source, and making various requirements concerning returns and assessments, this paragraph continues: 'The tax herein imposed upon annual gains, profits, and income not falling under the foregoing and

not returned and paid by virtue of the foregoing, shall be assessed by personal return, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.'

Paragraph G (a): 'The normal tax hereinbefore imposed upon individuals likewise shall be levied * * * upon the entire net income * * * accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships.'

(1) Inasmuch as all persons and property within the jurisdiction of a sovereignty are subject to taxation, and since the property cannot speak and the persons have no direct voice in wording the tax laws, it is a fundamental duty of the law-givers to make the scope of a tax law definite and its meaning clear; and therefore all doubts respecting scope and meaning are to be resolved in favor of the taxpayer. *Treat v. White*, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; *Gould v. Gould*, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211.

(2) By citing this rule we do not imply that there is in the Act of 1913 an ambiguity which must be construed against the government. In our judgment nothing could be clearer than the absence of any legislative intent to tax a property increment which during the tax year had no owner in being who received or was entitled to receive any of such increment. Paragraph A lays a tax each year upon the net income accruing in the preceding calendar year. Paragraph B defines net income as that which comes in from any interest in real or personal property and from any other source whatever. Subdivi-

sion 1 of paragraph A and paragraph G (a) condition the levy upon the fact that the income, either actually or potentially, and with full right of immediate disposition, comes into the hands of either a citizen, wherever resident, or a person who is a resident, but not a citizen, or a person who is neither a citizen nor a resident, but who owns property or carries on business here, or a corporation, joint-stock company, or association, or insurance company, organized in this country.

Otto Young's estate consists, say, of a great commercial building in a great commercial city; the net rentals, after payment of insurance, local taxes, maintenance and operation, exceed the amount required by the trustee to pay the annuities to the widow and children; at some remote period the estate as it may then exist is to be turned over to persons now unknown, possibly not now in existence; and in the meantime the estate is growing in value by reason of the rise in real estate and also by the accumulation of rentals. But neither the real estate as valued at Young's death, nor the increase in value, nor the accumulation of rentals, is a citizen or person or corporation, joint-stock company or association, or insurance company, mutual or stock. In no calendar year preceding a levy was there any sort of being to whom the trustee could pay or account for the accumulations of rentals. Paragraph D of course did not lay upon the trustee the duty of returning these accumulations as part of its own income. That paragraph required the trustee to report what it received for another who, if acting in his own behalf, would be called upon to show what he had received or was entitled to receive, with full power of immediate disposition, during the preced-

ing calendar year. Paragraph E, the only other part of the act referred to by government counsel, plainly adds nothing to the 'tax imposed,' but is concerned only with methods of administration.

Our reading of the act accords with the many and uniform rulings of the Treasury Department from the passage of the act down to July 26, 1915. Treas. Dec. No. 1906, issued November 28, 1913; Income Tax Regulations No. 33, Articles 70, 71, 74 and 75, issued January 5, 1914; Treas. Dec. No. 1943, issued February 4, 1914; Treas. Dec. No. 2090, issued December 14, 1914; Rulings on January 15 and 30, and February 9 and 27, 1915, in Income Tax Service 1915 on pages 379, 396, 426, 438; and the opinion of the Attorney General rendered to the Treasury Department on February 12, 1914, in Income Tax Service 1914 at page 260.

In Treas. Dec. No. 2231, issued July 26, 1915, the Department declared that—

'Any part of the annual income of trust estates not distributed becomes an entity and as such is liable for the normal and additional tax, which must be paid by the fiduciary. When the beneficiary is not *in esse* and the income of the estate is retained by the fiduciary, such income will be taxable to the estate as for an individual and the fiduciary will pay the tax both normal and additional.'

This ruling was the cause of the present and other similar suits. It illustrates the not unnatural tendency of tax officers to increase the revenues by implications and strained constructions. The department's first rulings were in harmony with the natural import of the language used by Congress; its later ruling does more than violate the canon that doubts and ambiguities are to go against the gov-

ernment, for it is based, not upon any uncertainty in the terms of the act, but upon a metamorphosis of a body of property into a person, and upon exactions contrary to the exemptions in the Act of 1913. If the unascertained residuary legatees were now at hand to receive from the trustee the accumulations of the preceding calendar year, they might be such in number as that nothing but the normal tax on the share of each in excess of his personal exemption could be assessed; but the department, by converting an estate into a personal entity, cuts off all personal exemptions and by adding the shares together subjects each share to the rates of surtaxes that are calculable on the sum total. If the residuary legatee were a charitable or educational institution, the department's method would add to the detriment due to the testator's postponement of the benefit the taxes and surtaxes throughout the period of postponement. Congress recognized that such alterations and amendments were legislative and passed the amendatory act of September 8, 1916 (39 Stat. 756), levying a tax upon undistributed income added to the principal of trust estates.

The judgment is reversed and the cause remanded for further proceedings in consonance with this opinion."

268 Federal Rep. pp. 230-233.

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